No. 91-1160-CFH
Status: GRANTED

Title: A. J. Arave, Warden, Petitioner
v.
Thomas E. Creech

Docketed:
January 14, 1992

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Thomas,Lynn E.

Counsel for respondent: Gardner,Cliff

Ptn mailed Jan. 14; recd Jan. 16, 1992

Entry	Date	Note	Proceedings and Orders
4	Dec 9 1991	D	Application (A91-411) for a stay pending filing and disposition of petition for writ of certiorari to CA 9, submitted to Justice O'Connor.
5	Dec 10 1991		Application (A91-411) denied by Justice O'Connor.
1	Jan 14 1992	G	Petition for writ of certiorari filed.
2	Feb 18 1992		Brief of respondent Thomas Creech (PRINTED) in opposition filed.
3	Feb 18 1992	G	Motion of respondent for leave to proceed in forma pauperis filed.
6	Mar 18 1992		DISTRIBUTED. April 3, 1992
7	May 27 1992		REDISTRIBUTED. June 12, 1992
8	Jun 15 1992		Motion of respondent for leave to proceed in forma pauperis GRANTED.
9	Jun 15 1992		Petition GRANTED.
			**********
10	Jun 29 1992	G	Motion of respondent for appointment of counsel filed.
13	Jul 29 1992		Record filed.
		*	Partial proceedings United States Court of Appeals for the Ninth Circuit (1 Box)
11	Jul 30 1992		Joint appendix filed.
12	Jul 30 1992		Brief of petitioner A.J. Arave, Warden filed.
14	Aug 21 1992		SET FOR ARGUMENT TUESDAY, NOVEMBER 10,1992. (2ND CASE).
17	Sep 3 1992	G	Motion of Thomas Gibson for leave to file a brief as amicus curiae filed.
15	Sep 4 1992		Brief of respondent Thomas Eugene Creech filed.
16	Sep 14 1992		CIRCULATED.
19	Oct 1 1992		Record filed.
		*	Original proceedings United States District Court for the District of Idaho. (1 Box)
18	Oct 5 1992		Motion for appointment of counsel GRANTED and it is ordered that Cliff Gardner, Esquire, of San Francisco, California, is appointed to serve as counsel for the respondent in this case.
21	Oct 5 1992	X	Reply brief of petitioner filed.
20	Oct 19 1992		Motion of Thomas Gibson for leave to file a brief as amicus curiae GRANTED.
22	Nov 10 1992		ARGUED

91-1160

No. _____

Supreme Court, U.S.
FILED
JAN 14 1992
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In The

Supreme Court of the United States

October Term, 1991

A. J. ARAVE, WARDEN,

Petitioner,

vs.

THOMAS E. CREECH,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is Idaho's statutory aggravating factor which authorizes the death penalty for murders committed with utter disregard for human life unconstitutionally vague because the limiting construction of this factor announced by the Idaho Supreme Court does not require that the factor be defined with reference to the occurrence of specifically defined acts?

2. May a United States Court of Appeals vacate a death sentence by interpreting a state statute to require a sentencing judge to make an express finding of the existence of particular factual components of a statutory aggravating circumstance?

3. When a death sentence is vacated by a state appeals court to correct a procedural defect of state law, does the Constitution require that sentencing proceedings be reopened to receive evidence of a prisoner's post-sentencing conduct in prison?

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No. _____

In The

Supreme Court of the United States

October Term, 1991

A. J. ARAVE, WARDEN,

Petitioner,

vs.

THOMAS E. CREECH,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Arvon J. Arave, Warden of the Idaho State Maximum Security Prison, petitions for a writ of certiorari to review the decision of the Ninth Circuit Court of Appeals, which granted federal habeas corpus relief to a prisoner sentenced to death on grounds that (1) a statutory aggravating factor which is part of the Idaho death penalty statutes is unconstitutionally vague and was not interpreted by the Idaho Supreme Court in sufficiently narrow fashion, (2) the sentencing judge did not make a subsidiary fact finding thought by the court of appeals to be necessary to a finding of two aggravating factors and (3) when, during state appellate proceedings, the defendant's case was remanded by the Idaho Supreme Court for the correction of a state statutory defect, having no

implications in federal law, Creech was not given a second sentencing hearing.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported as *Creech v. Arave*, 947 F.2d 873 (9th Cir. 1991). A copy of the opinion is appended to this petition.

JURISDICTION

The opinion of the court of appeals was first filed March 27, 1991, and amended on October 16, 1991. The court of appeals, also on October 16, 1991, denied petitioner Arave's petition for rehearing and suggestion for rehearing en banc, Judges Trott, Kozinski and T. G. Nelson, dissenting. Both the court of appeals and a justice of this court have denied petitioner's applications for a stays of mandate pending the disposition of this petition.

This case arose under 28 USC § 2254 and petitioner invokes the jurisdiction conferred on this court by 28 USC § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eighth Amendment to the Constitution of the United States, provides in pertinent part:

> " . . . nor cruel and unusual punishment inflicted."

Title 28, § 2254(a), United States Code, provides, in pertinent part:

> [A] circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Idaho Code § 19-2515 provides, in pertinent part:

> (c) Where a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the court finds at least one (1) statutory aggravating circumstance. Where the court finds a statutory aggravating circumstance the court shall sentence the defendant to death unless the court finds that mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstance found and make imposition of death unjust.
>
> (d) In all cases in which the death penalty may be imposed, the court shall, after conviction, order a presentence investigation to be conducted according to such procedures as are prescribed by law and shall thereafter convene a sentencing hearing for the purpose of hearing all relevant evidence and arguments of counsel in aggravation and mitigation of the offense. At such hearing, the state and the defendant shall be entitled to present all relevant evidence in aggravation and mitigation. Should any party present aggravating or mitigating evidence which has not previously been disclosed to the

opposing party or parties, the court shall, upon request, adjourn the hearing until the party desiring to do so has had a reasonable opportunity to respond to such evidence. Evidence admitted at trial shall be considered and need not be repeated at the sentencing hearing. Evidence offered at trial but not admitted may be repeated or amplified if necessary to complete the record.

(e) Upon the conclusion of the evidence and arguments in mitigation and aggravation the court shall make written findings setting forth any statutory aggravating circumstance found. Further, the court shall set forth in writing any mitigating factors considered and, if the court finds that mitigating circumstances outweigh the gravity of any aggravating circumstance found so as to make unjust the imposition of the death penalty, the court shall detail in writing its reasons for so finding.

(f) Upon making the prescribed findings, the court shall impose sentence within the limits fixed by law.

(g) The following are statutory aggravating circumstances, at least one (1) of which must be found to exist beyond a reasonable doubt before a sentence of death can be imposed:

. . .

(6) By the murder, or circumstances surrounding its commission, the defendant exhibits utter disregard for human life.

(7) The murder was one defined as murder of the first degree by section 18-4003, Idaho Code, subsections (b), (c), (d), (e) or (f), and it was

accompanied with the specific intent to cause the death of a human being.

Idaho Code § 18-4003 provides in pertinent part:

(c) Any murder committed by a person under a sentence for murder of the first or second degree, including such persons on parole or probation from such sentence, shall be murder of the first degree.

. . .

(e) Any murder committed by a person incarcerated in a penal institution upon a person employed by the penal institution, another inmate of the penal institution or a visitor to the penal institution shall be murder of the first degree.

Idaho Code § 19-2827 (c) provides as follows:

(c) With regard to the sentence the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether the evidence supports the judge's finding of a statutory aggravating circumstance from among those enumerated in section 19-2515, Idaho Code, and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and defendant.

STATEMENT OF THE CASE

On May 13, 1981, Thomas Creech was an inmate in an Idaho penal institution where he was serving sentences for two first degree murders. On that day, Creech murdered David Jensen, a physically handicapped inmate,[1] who had been imprisoned for a non-violent crime, by kicking and beating him to death with a sock filled with dry-cell batteries. See *State v. Creech*, 670 P.2d 463 (Idaho 1983). On a plea of guilty, Creech was convicted and sentenced to death for killing Jensen. *Id.* The conviction and sentence were upheld on review by the Supreme Court of Idaho. *Id.* Creech's petition to this Court for a writ of certiorari was denied. *Creech v. Idaho*, 465 U.S. 1051 (1984).

The Jensen killing led to Creech's fifth conviction for first degree murder. Creech has variously admitted to having committed from 26 to 40 murders, State Supreme Court Transcript, Vol.II, pp.244-246, eleven of which were verified by law enforcement officials, State Supreme Court Transcript, Vol.II, p.146.

Although Creech gave several different versions of the Jensen murder, including one that contained elements of self-defense and sudden rage, there was evidence that Creech himself induced the nearly-helpless Jensen to attack him in order to create the pretext for a deadly

---

[1] Sometime prior to his incarceration, Jensen suffered a gunshot wound to the head which left him with brain damage, partial paralysis and a protective plate over a portion of his skull. State Supreme Court Transcript, Vol.II, pp.197-199.

response. At his sentencing hearing, Creech testified as follows:

> CREECH: Two different people come [sic] to me and asked me to kill David Jensen for money and one said he would help me escape from the penitentiary if I would kill him.
>
> I even told David about this, but he still thought that – I am not sure what. He wanted to impress me. He wanted to be a part of these gangs and he accepted these.
>
> And a lot of people wouldn't accept him because he was partially crippled and they thought he was nobody.
>
> On the morning that the murder happened, I was responsible for giving the weapons to someone else and they give [sic] them to David. It wasn't – I tried to tell him after the first part of the incident happened, that just to leave it be, to walk away from it and I thought it was over with.
>
> He went and he took a shower and come back to his cell, and I watched the guy hand him the knife, and he locked in his cell and I asked him not to come out because if he did I would have to kill him.
>
> But to impress those people, he come [sic] out anyway and I killed him.
>
> State Supreme Court Tr., Vol.II, pp.246-247.

Creech, at this own insistence, pled guilty over his counsel's objection and with the knowledge that he would likely be sentenced to death. See *State v. Creech*, 710 P.2d 502 (Idaho 1985). Creech later sought to withdraw his guilty plea, asserting that he had misled the court in order to get his plea accepted.

The sentencing judge found as aggravating factors, among others, that the murder had been committed with utter disregard for human life, Idaho Code § 19-2515(g)(6), that the murder was committed by a person already under a sentence for murder, Idaho Code § 19-2515(g)(7) and that the murder was committed against another prison inmate. Idaho Code § 19-2515(g)(7).

On direct review of the death sentence, Creech complained that although the state district court had conducted a full sentencing hearing it had denied him the right to be present at a critical stage of the proceedings by publishing the sentencing decision in writing rather than bringing Creech before the court for oral pronouncement of sentence. The Idaho Supreme Court deferred action on the direct appeal and returned the case to the district court, ordering that it comply with Idaho Code § 19-2503, which requires that defendant be present for sentencing. *Creech*, 670 P.2d at 466, n.1. During this time, the state supreme court *retained jurisdiction* of the case pending compliance with the remand order. R., State Supreme Court, Vol.5, p.9. Its order told the district judge that he was, "in the presence of the defendant and his counsel," to "enter a judgment of conviction and impose such sentence . . . as to the said District Judge may appear to be just and appropriate." *Id.* This was to be accomplished within fourteen days of the date of the order. *Id.*

When the case came before the sentencing judge on the temporary remand order, Creech's counsel moved for a second full sentencing hearing, which was denied because Judge Newhouse thought it was beyond the scope of the remand order.

After being denied relief in the state courts, Creech filed a petition for a writ of habeas corpus in the United States District Court for the District of Idaho. Relief was denied and in 1986 Creech appealed to the Ninth Circuit Court of Appeals. Almost two years later, in April of 1988, the case was argued. Three years after that the court of appeals decided the case. On October 16, 1991, the court filed an amended opinion and denied the warden's request for rehearing and suggestion for rehearing *en banc*.

The court ordered that Creech be granted *habeas* relief on the following grounds: (1) Idaho's statutory aggravating factor which authorizes the death penalty for first degree murders committed with "utter disregard for human life" is, in the court's view, too vague to allow for principled distinction between capital murders and others, (2) the Idaho Supreme Court's construction limiting the applicability of this factor is not sufficient, (3) although the Idaho sentencing court found that the murder was aggravated by two statutory factors related to Creech's inmate status, the sentencer did not expressly state that he found facts that would support the aggravating factors and (4) the state courts were required to grant Creech a second sentencing hearing when, during the pendency of his appeal from the sentence of death, the Idaho Supreme Court temporarily remanded the case to allow the district court to correct a statutory sentencing error.

In a dissent from the court's denial of a rehearing *en banc*, Judge Trott, joined by Judges Kozinski and T. G. Nelson, argued that the panel which decided Creech's appeal "misapplied the holding of the Supreme Court in

Walton v. Arizona, 110 S.Ct. 3047, 3057 (1990), in such a way as to bring about one application of the *Walton* test for Arizona, and a different application of the same test for Idaho." *Creech v. Arave*, slip op., p.14356, App., p.43. Specifically, the dissenting judges concluded that the Idaho Supreme Court's decision in *State v. Osborn*, 631 P.2d 187 (Idaho 1981), not only gives "*some* guidance" in the application of the "utter disregard" factor, "it gives substantive guidance." *Creech v. Arave*, slip. op., p. 14358, App., p.45.

This petition is taken from the decision of the Court of Appeals.

REASONS FOR GRANTING THE WRIT

The holding of the Court of Appeals for the Ninth Circuit, for the reasons stated below, is inconsistent with this court's precedent and raises questions of general importance for the administration of death penalty statutes.

I

The Court of Appeals Holding Which Invalidated Idaho's "Utter Disregard" Aggravating Factor Is Inconsistent With This Court's Precedent In That It Misapplies Walton v. Arizona And Fails To Accord A Presumption Of Correctness To State Factual Findings

One of Idaho's statutory aggravating factors empowers the sentencing judge to impose the death penalty when, by a first degree murder "or the circumstances surrounding its commission, the defendant exhibits utter

disregard for human life." Idaho Code § 19-2515(g)(6). The Idaho Supreme Court applied a limiting construction to this statutory provision in *State v. Osborn*, 631 P.2d 187 (Idaho 1981). As the court construed section 19-2515(g)(6), it is to be applied to "acts or circumstances surrounding the crime which exhibit the highest, utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer." *Osborn*, 631 P.2d at 201. By concluding that this factor does not overlap other aggravating factors, the Idaho court held that the "utter disregard" factor is not proved merely by showing the presence of some other factor, such as multiple murder, or an especially heinous murder. *Id.*

The Idaho Court's resort to descriptive terms like utmost callousness, pitilessness and cold-bloodedness, some of which were suggested to the Idaho Court by *Profitt v. Florida*, 428 U.S. 242, 255 (1976), refers the sentencing judge to words of common meaning and understanding. By this process, the "utter disregard" factor singles out killings that are not the product of significant emotional distress or provocation. Section 19-2515(g)(6) was thus made to apply at least to those killings which are the product of a desire to kill solely for the pleasure derived from murder by persons like Creech.

Although the sentencing judge somewhat confusingly observed that the murder "evidenced an excessive violent rage,"[2] he appears to have been describing the frenzied and brutal nature of the attack rather than Creech's motivation for the crime. See, Part II *infra*. The

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[2] The court of appeals concluded that Judge Newhouse's comment was inconsistent with his "utter disregard finding."

judge also stated that "the murder, once commenced, appears to have been an intentional calculated act." In his statement of reasons for imposing the death penalty, Judge Newhouse described Creech as an habitual killer who could not be deterred by anything less than the death penalty.

The Idaho Supreme Court is required by Idaho Code § 19-2827(c) to review the evidentiary support for sentencing findings, see *Osborn, supra,* and it must be assumed that the court found as a matter of fact that the murder was a calculated and cold-blooded act in accordance with the evidence to that effect. Cf. *Cabana v. Bullock,* 474 U.S. 376 (1986) (whether the sentencer or a state reviewing court makes the requisite finding of culpability is not an issue for a federal habeas court. A state supreme court's conclusion as to the factual correctness of a finding of culpability is entitled to a presumption of correctness). Instead of according the presumption of correctness to the state court's decisions, the court of appeals concluded that the factual findings of the Idaho court did not demonstrate that Creech was a cold-blooded, pitiless killer and that this illustrated the vagueness of the *Osborn* limiting construction.

Not only does the court of appeals' decision improperly intrude upon the fact-finding functions of state courts, it also misapplies *Walton v. Arizona,* 110 S.Ct. 3047 (1990), by requiring the state to engage in exercises of statutory definition that this Court has not demanded. *Walton* holds that a state definition of vague terms is constitutionally sufficient if it provides *some,* though not mathematically precise, guidance to the sentencing authority. Thus, Arizona's "especially heinous" factor

was found to be sufficiently limited by definitions that equated "cruelty" with mental anguish, "heinousness" with torture or physical abuse, and "depravity" with indifference to suffering. Most of these terms relate to subjective states of mind on the defendant's part and are not objectively distinguishable from the defining terms used by the Idaho Supreme Court in *Osborn*.

The Court of Appeals' view of what *Walton* means adds a requirement for the identification of objectively determinable "specific acts," which would require the state to limit the applicability of its aggravating factor by a catalog of specific incidents of the defendant's behavior. The court's holding makes it nearly impossible to rely on any element of subjectivity in the definition of aggravating factors.

This Court has not imposed such restrictions on a state's right to define the cases to which the death penalty will apply, nor have other courts. In *People v. Lucas,* 548 N.E.2d 1003 (Ill. 1989), the Supreme Court of Illinois, distinguishing *Maynard v. Cartwright,* 486 U.S. 356 (1988), held that the term "especially brutal or heinous, indicative of wanton cruelty" was sufficiently narrow because the term "especially brutal or heinous" was modified by the requirement for a showing of "wanton cruelty." See also, *People v. Odle,* 538 N.E.2d 428 (Ill. 1988). Subjective definitions of similar character are common in states with death penalty statutes. See, e.g., *Smalley v. State,* 546 So.2d 720 (Fla. 1989) ("utter indifference to suffering" to define "cruelty"); *Brown v. State,* 565 So.2d 304 (Fla. 1990) ("cold, calculated and premeditated"); *State v. Fullwood,* 373 S.E.2d 518 (N.C. 1988) ("conscienceless, pitiless, unnecessarily torturous.")

The opinion below threatens to open a new chapter in death penalty litigation in which the dominant theme will be that state courts must define all potentially subjective terms with lists of specific acts. The Court of Appeals comes close to requiring that state courts reach mathematical precision in defining the reach of aggravating factors. The principle announced by the Court of Appeals raises an issue of general importance which should be addressed by this Court.

II

A United States Court Of Appeals May Not Properly Vacate A Death Sentence By Interpreting A State Statute To Require A Sentencing Judge To Make An Express Finding Of The Existence Of Particular Factual Components Of A Statutory Aggravating Circumstance

Idaho law authorizes the death penalty for First Degree Murder committed by a prison inmate who is serving sentences for first degree murder and for the first degree murder of a fellow prison inmate. In each such case the state must show, as a prerequisite to the death penalty, that the murder was one of the first degree and that the murder was accompanied by the specific intent to cause death. Idaho Code, § 19-2515(g)(7).

Without citing any principle of federal law, the Court of Appeals held that the sentencer's failure to make an express finding of specific intent was an omission that entitled Creech to federal habeas relief. The court concluded that although there was evidence of specific intent upon which the sentencing judge could have relied, his findings "fail to indicate that he found specific intent

beyond a reasonable doubt before applying Section § 19-2515(g)(7)." Slip. op., p.14341, App., p.25.

Implicitly, the court's holding was that the sentencer must not only make specified findings in connection with § 19-2515, but that these findings must follow a particular format. In his formal written judgment, the sentencing judge set forth his findings of statutory aggravating factors by identifying each factor upon which he relied. In relevant part, the findings read as follows:

> 6. Statutory Aggravating Circumstances Found Under Section 19-2515(f), Idaho Code
>
> * * *
>
> C. The murder was one defined as Murder of the First Degree by Section 18-4003, Idaho Code Subsection (c). The defendant was under a sentence for Murder of the First Degree at the time of his actions.
>
> D. The murder was one defined as Murder of the First Degree by Section 18-4003, Idaho Code, subsection e. The defendant committed the murder on a fellow inmate while both were incarcerated in the Idaho State Correctional Institution.
>
> Findings of the Court In Considering the Death Penalty, etc., State Supreme Court Record, Vol.3, p.57.

In the circumstances of this case, Idaho Code § 19-2515 does in deed predicate the death penalty on evidence that a murder by an inmate already serving a sentence for first degree murder or the murder of a fellow

inmate was accomplished with specific intent to kill. The action of the state sentencing judge in finding the existence of these two aggravating factors would seem to indicate that the judge had found all the requisite supporting facts, including specific intent to kill. That is especially so in light of the Court's holding in *Walton v. Arizona*, 111 L.Ed.2d 511 (1990) that while it is essential that *jurors* be *instructed* in all facets of the sentencing process, this logic "has no place in the context of sentencing by a trial judge." *Walton*, 11 L.Ed.2d at 425. "Trial judges are presumed to know the law and to apply it in making their decisions." *Id.* In departing from this principle, the Court of Appeals also departed from its own law. In *Knaubert v. Goldsmith*, 791 F.2d 722 (9th Cir. 1986), the court held that not every fact supporting a state court finding "need be stated on the record in infinite detail and clarity. In certain circumstances we will recognize that factual determination is implicit in the actions taken by a state court." 791 F.2d at 727. Accordingly, the court held that it would assume that a state judge found facts necessary to support a ruling on a suppression motion. Cf. *People v. Lucas*, 548 N.E.2d 1003 (Ill. 1989) (Death sentences are reviewed on entire record with the object of determining whether aggravating factors have been proved.); *State v. Osborn, supra*. The same principle should have been applied in Creech's case. A sentencing judge's finding that a statutory aggravating factor is present necessarily implies that the state courts have found all the factual components of that factor to the requisite degree of proof.

The Court of appeals should have taken the position that the trial court's finding was entitled to a presumption of correctness because it necessarily included a

finding that Creech acted with specific intent (if one assumes that the trial judge read the statute, *Walton, supra*). Such a factual determination must be presumed correct. 23 USC § 2254(d). "A habeas court may not disregard this presumption unless it expressly finds that one of the enumerated exceptions to § 2254(d) is met and explains the reasoning in support of that conclusion." *Burden v. Zant*, 112 L.Ed.2d 962, 968 (1991). See also, *Demosthenes v. Baal*, 109 L.Ed.2d 762 (1990). As in *Burden*, the Court of Appeals gave no explanation of why it chose to disregard the presumption.[3]

The result is especially peculiar because the sentencing judge stated expressly that he believed Creech had intended to kill the victim, David Jensen. After finding that the statutory aggravating factors had been proven, the sentencing judge, in a section of his findings entitled "Reasons Why Death Penalty Was Imposed" the judge entered a finding in these terms: "This defendant intentionally destroyed another human being at a time when he was completely helpless." Findings, State Supreme Court Record, p.58. In the section of the court's findings entitled "Facts and Arguments found in Aggravation," the judge found "that the victim, once the attack commenced, was under the complete domination and control

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[3] We know of no authoritative basis to conclude that the presumption of § 2254(d) applies differently to express factual findings and those implicit in a sentencing court's conclusion that the state had made the factual showing necessary to sustain the finding of a statutory aggravating circumstance. If the Court of Appeals relied on such authority, it did not cite it.

of the defendant. The murder itself was extremely gruesome evidencing an excessive violent rage. With the victim's attack as an excuse, the defendant's murder then took on many of the aspects of an assassination." Findings, State Supreme Court Record, p.56.

The Eighth Amendment does not compel the conclusion of the Court of Appeals. The Court held in *Cabana v. Bullock*, 474 U.S. 376 (1986), that "the Eighth Amendment is satisfied so long as the death penalty is not imposed upon a person ineligible under *Enmund* [v. Florida, 458 U.S. 782] for such punishment. If a person sentenced to death *in fact killed*, attempted to kill, or intended to kill, the Eighth Amendment is not violated by his or her execution . . . . " 474 U.S. at 386. Thus, even a murder committed in the course of a robbery could constitutionally result in a death penalty if the robber was the actual killer, as the California Supreme Court held in *People v. Anderson*, 742 P.2d 1306 (Cal. 1987).

The Court of Appeals, however, has held that notwithstanding Creech's status as the actual killer of another inmate, the Idaho statutory provision conditioning the death penalty on an additional finding of specific intent requires the sentencer, in addition to finding the aggravating factor, to also make express findings as to its components. The Idaho statute does not require this, nor does the Constitution.

Although a trial jury must be instructed that it must find every element of a crime according to the required standard of proof, *Cabana*, litigatory attempts to convert enhancement components into elements of crime have failed, see Walton, *supra*. The principle of Walton that the

Enmund finding need not be the subject of proof as an element of the offense, and therefore submitted for express consideration by a jury, is no different in character than that a sentencing judge need not explain that by finding the presence of an aggravating factor, he has also found the presence of all its component parts.

The decision below should be reviewed because the court's weakening of the presumption of correctness has implications for all of the death penalty states of the Ninth Circuit as well as those in jurisdictions which may be encouraged to follow the court's example.

III

The Court of Appeals' Holding That A Remand During Appeal For The Purpose Of Correcting A Procedural Defect Entitled Creech To A New Sentencing Hearing Is Inconsistent With *Skipper v. South Carolina*, 476 U.S. 1 (1986)

While Creech's appeal was pending in the Idaho Supreme Court, the case was returned to the sentencing judge in order to insure that the sentence was pronounced in Creech's presence. This action was based solely on a state statute which requires the defendant's physical presence at sentencing. Idaho Code § 19-2503. Creech had a full sentencing hearing, at which he was present, but the sentencing judge thereafter issued his sentencing judgment in writing. Creech was not absent at any critical stage of the proceedings as tested by *Snyder v. Massachusetts*, 291 U.S. 99 (1934).

Skipper v. South Carolina, 476 U.S. 1 (1986) holds that a defendant facing a possible death sentence must be

allowed to present evidence of his conduct in jail while awaiting sentencing for whatever mitigating value it may have. The case cannot be fairly read to mean that a defendant is entitled to a new sentencing hearing when his case is returned to the sentencing judge for the correction of a mere procedural defect. The Idaho Supreme Court retained jurisdiction during this remand and required that Judge Newhouse comply with its order within fourteen days.

If these circumstances reopen a case for a new sentencing hearing, logical extension of the principle is that a capital defendant is forever entitled to periodic sentencing hearings to give him the opportunity to argue that his behavior in prison may persuade a sentencing judge to reduce his sentence. There could never be an execution if such a rule prevailed. *Skipper* stands only for the unexceptionable proposition that a defendant is entitled to present all mitigating factors at the time of his sentencing hearing.

The Idaho Supreme Court's decision in *Sivak v. State*, 731 P.2d 192 (Idaho 1986), which the court of Appeals found persuasive, relies on *Skipper* incorrectly. That fact should not lead to a rule which so seriously undermines the finality of judgments.

CONCLUSION

Petitioner Arave requests that a writ of certiorari issue and that the judgment of the Court of Appeals be reversed.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS E. CREECH, *Petitioner-Appellant,* v. A.J. ARAVE, Warden, Idaho State Penitentiary; AL MURPHY, Director, Idaho State Board of Corrections; JIM JONES, Attorney General, State of Idaho, *Respondents-Appellees.*	No. 86-3983 D.C. No. CV-86-1042-HLR ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Idaho
Harold J. Ryan, District Judge, Presiding

Argued and Submitted
April 6, 1988 – Seattle, Washington

Submission Deferred August 25, 1988
Resubmitted July 12, 1990
Filed March 27, 1991
Amended October 16, 1991

Before: Robert R. Beezer, Cynthia Holcomb Hall and Charles Wiggins, Circuit Judges.

Opinion by Judge Hall; Dissent by Judge Trott, with whom Judges Kozinski and T. G. Nelson, join.

SUMMARY

Constitutional Law

Affirming in part, reversing in part and remanding a district court denial of a petition for habeas relief, the court of appeals held that appellant was not denied effective assistance of counsel when he did not allow counsel to inform him of the elements of the offense of first degree murder or possible defenses before voluntarily changing his plea to that of not guilty.

Appellant Thomas E. Creech murdered a fellow inmate while incarcerated on other murder convictions. He pleaded guilty in state court to first degree murder and was sentenced to death. The district court denied Creech's petiton [sic] for habeas relief. Creech argued that he should be allowed to withdraw his guilty plea because he was denied effective assistance of counsel in that his attorney failed to provide him with certain information prior to the making of his guilty plea; that in the absence of such information, his plea was not "voluntary and intelligent" and therefore cannot be allowed to stand.

The assistance of counsel received by a defendant is relevant to the question of whether a defendant's guilty plea was knowing and intelligent insofar as it affects the defendant's knowledge and understanding. Although the Supreme Court has stated that ineffective assistance of counsel can apply to guilty pleas, most cases dealing with such challenges have involved attorney recommendations that the defendant plead guilty. Here, Creech claimed that his counsel failed adequately to discuss the elements

of the crime or possible defenses with him before he changed his plea from not guilty to guilty. However, his counsel had been allowed less than 15 minutes to attempt to change his client's mind, and had informed the state trial court that he believed Creech should continue to plead not guilty. The district court found as a matter of fact that counsel did not discuss with Creech the specific elements of the offense with which Creech was charged or possible defenses to these charges. Nevertheless, the district court found that counsel's performance throughout the state proceedings did not fall below an objective standard of reasonableness. However, any omission on counsel's part was not the result of his incompetence as counsel. Creech had simply not allowed his counsel to inform him of the elements of the offense or possible defenses. Counsel told Creech that his advice was to not change his plea, and that he needed more time. Nevertheless, Creech informed the state court that he wished to proceed and plead guilty. Creech could not now make the claim that he was unfairly deprived of the assistance of counsel.

The district court correctly rejected Creech's argument that his ignorance of the elements of first degree murder should invalidate his plea. That court found that Creech understood that malice or intent was an element of first degree murder at the time he pled guilty. The court found it inconceivable and not merely improbable that Creech would have gone to trial on a defense of imperfect self-defense, or that if he had done so he either would have been acquitted, or if convicted, would nevertheless have been given a shorter sentence than he

actually received. Even assuming his counsel's performance was not reasonable, the court believed Creech's ignorance of the possible defense of "imperfect self-defense" was harmless beyond a reasonable doubt. In addition, the court affirmed the district court's conclusion regarding Creech's competency to plead guilty. Creech failed to show that he was incompetent to plead guilty.

Creech's right to confrontation was not violated because he had the opportunity, other than through cross-examination, to dispute the accuracy of the presentence report prior to and at his sentencing hearing. His counsel had been given the report prior to the sentencing hearing.

Creech argued that although he was allowed to present any and all mitigating evidence at his initial sentencing hearing, because the Idaho Supreme Court voided that sentence and ordered resentencing, constitutionally he must be allowed another opportunity to do so. Like the Idaho Supreme Court, the Ninth Circuit saw no rational basis for distinguishing the evidence of a defendant's good conduct while awaiting trial and sentencing, and evidence of a defendant's good conduct pending review of a death sentence that is vacated on appeal. On this basis, the appellate court reversed and remanded with instructions to grant the petition for habeas relief. The writ shall order Creech's release if, within a reasonable time set by the district court, Idaho fails to vacate Creech's sentence and provide Creech with a resentencing hearing at which he can present any and all mitigating evidence that exists at the time of the hearing.

Creech claimed that the state trial court applied two aggravating circumstances without making a required

finding. The appellate court found that there was evidence by which the state court could have concluded that Creech had specific intent. At the time he pleaded guilty, Creech admitted that he intended to kill the victim. Nevertheless, that court's findings failed to indicate that the court found specific intent beyond a reasonable doubt before applying the statutory aggravating circumstance. On remand, the district court shall grant the petition ordering Creech's release if the state court at resentencing applies the aggravating circumstances under that statute without making a finding of specific intent. In addition, the court also concluded that the statutory aggravating circumstance that "the defendant exhibited utter disregard for human life" is unconstitutionally vague. The court also found the Idaho limiting construction of such statutory circumstance, as applied to Creech, to have been unconstitutionally vague. The court therefore reversed and remanded with instructions to grant the petition ordering Creech's release unless, within a reasonable time set by the district court, the Idaho court balances the remaining, constitutionally valid aggravating and mitigating factors to determine whether Creech should be sentenced to death.

Creech's argument that the Constitution guarantees a jury trial on the existence of aggravating circumstances that may result in the imposition of a sentence of death has been fully rejected by the Supreme Court. That court held that there is no sixth amendment right to jury sentencing, even where the sentence turns on specific findings of fact.

The court rejected Creech's claims that his case should be remanded to the district court because the

district court improperly limited its evidentiary hearing on his petition. Creech had a full and fair opportunity to present the relevant facts of his claims. His counsel had more than enough time between the affirmance of Creech's death sentence and the deadline for filing of post conviction challenges to prepare any post-conviction claims for relief. Creech was thus not entitled to an evidentiary hearing on this basis.

COUNSEL

Cliff Gardner, Fiedler & Gardner, San Francisco, California, for the petitioner-appellant.

Lynn E. Thomas, Solictor General for the State of Idaho, Boise, Idaho, for the respondents-appellees.

ORDER

The opinion filed on March 27, 1991 is hereby amended as follows:

In 928 F.2d at 1487, the following is deleted: "Creech has not pointed to any evidence to support his claim. The only 'evidence' purported to buttress his claim of incompetency contains to the record."

The following is inserted in lie thereof:

"Contrary to Creech's assertion, Dr. Heyrend did not conclude that Creech could not appreciate the consequences of decisions such as waiving legal rights. When asked, "Do you have any information or evidence to

indicate to your satisfaction that at the time of the defendant's plea in this case, that he did not intend to plead guilty or did not recognize the consequences of that legal act?," Dr. Heyrend replied, "I really have no information in that area." While Dr. Stoner was more supportive of Creech's position, even he admitted, "I think there's room to be more certain than I am in this case." Creech failed to show that he was incompetent to plead guilty."

In 928 F.2d at 1491, at the end of the third full paragraph, add the following footnote after the citation to *Osborn*, 631 P.2d at 201:

> "The Idaho Supreme Court also noted that,
>
> To properly define [the "utter disregard"] circumstance, it is important to note the other aggravating circumstances with which this provision overlaps. The second aggravating circumstance, I.C. § 19-2515 (f)(2), that the defendant committed another murder at the time this murder was committed, obviously could show an utter disregard for human life, as could the third aggravating circumstance, I.C. § 19-2515 (f)(4), that the murder was committed for remuneration. Since we will not presume that the legislative intent was to duplicate any already enumerated circumstance, thus making I.C. § 19-2515 (f)(6) mere surplusage . . . , we hold that the phrase "utter disregard" must be viewed in reference to acts other than those set forth in I.C. §§ 19-2515 (f)(2), (3), and (4).

Rather than explaining what "utter disregard for human life" means, this passage merely recognizes that the legislature must have meant it to mean something other than the preexisting aggravating circumstances. Since none of

these aggravating circumstances are at issue, this language does not help us to determine the meaning of "utter disregard." "

In 928 F.2d at 1492, at the end of subsection C, the words ", as applied to Creech, to have been" are deleted and the word "is" is inserted in lieu thereof.

In 928 F.2d at 1492, the second paragraph of footnote 16 is deleted.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed R. App. P. 35.

With these amendments the petition for rehearing from the appellant and the petition for rehearing from the appellees are DENIED and both suggestions for rehearing en banc are REJECTED.

OPINION

HALL, Circuit Judge:

Petitioner Thomas E. Creech appeals from the district court's denial of his petition for a writ of habeas corpus. Creech is currently incarcerated at the Idaho State Correctional Institution ("ISCI") on the basis of three Idaho murder convictions. The conviction which gives rise to

this appeal is based on Creech's 1981 murder of David Jensen, a fellow inmate at ISCI. Creech pleaded guilty to first degree murder and was sentenced to death.

I

The facts and proceedings in this case are adequately described in opinions rendered by the Idaho Supreme Court after Creech's direct appeal, *State v. Creech*, 670 P.2d 463, 465-66 (Idaho 1983), *cert. denied*, 465 U.S. 1051 (1984) (*"Creech I"*), *and after his efforts to obtain post-conviction relief, State v. Creech*, 710 P.2d 502, 502-07 (Idaho 1985) (*"Creech II"*). Additional facts will be discussed where relevant to the issues we must decide in this appeal.

II

We review *de novo* the district court's denial of a petition for habeas corpus. *Carter v. McCarthy*, 806 F.2d 1373, 1375 (9th Cir. 1986), *cert. denied*, 484 U.S. 870 (1987). We review any factual findings made by the district court for clear error. *Hayes v. Kincheloe*, 784 F.2d 1434, 1436 (9th Cir. 1986), *cert. denied*, 484 U.S. 871 (1987).

III

Creech initially contends that he should be allowed to withdraw his guilty plea. This contention rests upon two arguments. First, Creech argues that he was denied effective assistance of counsel because his attorney failed to provide him with certain information prior to the making of his guilty plea. Second, Creech argues that in

the absence of such information, his plea was not "voluntary and intelligent" and therefore cannot be allowed to stand. We find these arguments differ merely in form, not in substance, *Evans v. Meyer*, 742 F.2d 371, 375 (7th Cir. 1984) and therefore we will discuss them together.

A guilty plea must represent "a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). "The assistance of counsel received by a defendant is relevant to the question of whether a defendant's guilty plea was knowing and intelligent insofar as it affects the defendant's knowledge and understanding." *United States v. Frye*, 738 F.2d 196, 199 (7th Cir. 1984).

Although the Supreme Court has found that ineffective assistance of counsel can apply to guilty pleas, *Hill v. Lockhard*, 474 U.S. 52, 58 (1985), most cases that have dealt with such challenges have involved attorney recommendations that the defendant plead guilty. Here, however, Creech's attorney, Rolf Kehne, told the court in Creech's presence that he believed Creech should continue to plead not guilty. Creech himself acknowledged that "my attorney advised me not to plead." Thus, the alleged error is not that Kehne misled Creech by recommending the wrong plea, but that he failed to provide Creech with certain information. Specifically, Creech claims Kehne failed adequately to discuss the elements of the crime or possible defenses with him before he pleaded guilty.

To establish that he received ineffective assistance of counsel, Creech must show: (1) his attorney's representation fell below an objective standard of reasonableness, and (2) that the deficient performance prejudiced the

defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In reviewing alleged deficiencies in representation, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.

Creech pleaded not guilty at his initial arraignment on June 19, 1981 before Judge Newhouse of the Idaho state district court. On August 28, 1981, Judge Newhouse convened a plea hearing in response to a letter from Creech stating that he wished to plead guilty. Kehne stated by way of affidavit that he had "absolutely no advance notice" that Creech was going to change his plea, and he was allowed "less than fifteen minutes" to attempt to change his client's mind.

The district court found "as a matter of fact" that Kehne did not discuss with Creech the "specific elements of the offense with which he was charged or possible defenses to these charges." Nevertheless, the district court reviewed counsel's performance throughout the state court proceedings and held that "[Kehne's] representation did not fall below an objective standard of reasonableness."

To establish that Kehne's representation fell below an objective standard of reasonableness, Creech must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. *Strickland*, 466 U.S. at 687. In support of his claim that Kehne's failure to inform him of the elements of the crime and possible defenses were omissions which fell below this standard, Creech relies on *Brown v. Butler*, 811 F.2d 938 (5th Cir. 1987) and *United*

States v. Bigman, 906 F.2d 392 (9th Cir. 1990). In *Brown*, the Fifth Circuit held that counsel's failure to inform the defendant of a venue defense prior to his guilty plea rendered counsel's performance below the objective standard of reasonableness. Because of this omission, the court believed the defendant was unable to make an informed and conscious choice with respect to his plea. *Brown*, 811 F.2d at 942. In *Bigman*, this circuit required remand for an evidentiary hearing due to uncertainty whether the defendant had been apprised of the intent element of the crime to which he pleaded guilty.

Unlike *Brown* and *Bigman*, however, any omission on Kehne's part was not the result of his incompetence as counsel. Creech simply did not allow his counsel to inform him of the elements of the offense or possible defenses. The transcript of the August 28 plea hearing shows that Kehne explicitly told the court in Creech's presence that the guilty plea was against his advice. As the district court properly noted, "a defendant may not be forced to abide by the advice of counsel."[1]

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[1] Creech now characterizes his actions as a waiver of the right to counsel and argues that under *Faretta v. California*, 422 U.S. 806, 817 (1975) his waiver cannot stand since he was not advised of the "dangers and disadvantages of self-representation." We believe the issue here is more properly seen as whether Creech voluntarily and knowingly pleaded guilty, not whether he waived counsel.

At the hearing, Judge Newhouse attempted to ensure that Creech was aware of the dangers of pleading guilty. In response to the judge's questions, Creech acknowledged that he understood that by pleading guilty. In response to the judge's questions, Creech acknowledged that he understood

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Furthermore, at that hearing Creech told the court that he had discussed the plea with counsel, that he believed he had sufficient time to discuss his plea with counsel, that he was satisfied with his attorney's representation, and that he understood that by pleading guilty he was giving up any defense to the charge.

Kehne told Creech that his advice was to not change the plea. He also told Creech that he needed more time. Nevertheless, Creech informed the court that he wished to proceed and plead guilty. We cannot now accept the claim that Creech was therefore unfairly deprived of the assistance of counsel. Kehne's actions were reasonable under the circumstances.

Creech has also failed to show that he was prejudiced. In *Hill v. Lockhart*, 474 U.S. 52, 58 (1985), the Supreme Court held that requiring a showing of prejudice serves "the fundamental interest in the finality of guilty pleas." The Court noted that,

> Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice. The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast

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that by pleading guilty he was admitting the crime, giving up any defenses to the charge, and forgoing his constitutional rights to trial by jury and to confront his accusers, as well as the privilege against self-incrimination. Creech also acknowledged that he understood that the maximum penalty for first degree murder was death.

> majority of criminal convictions result from such pleas. Moreover, the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea.

Id. (quoting *United States v. Timmreck*, 441 U.S. 780, 784 (1979)).[2]

First, with respect to Creech's claim that he did not understand the elements of the offense of first degree murder, Creech contends that the "malice" element was not adequately explained to him. The Supreme Court has stated that a plea may be involuntary "because [the defendant] has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt." *Henderson v. Morgan*, 426 U.S. 637, 645 n.13 (1976). "Without . . . proof that [the defendant] in fact understood the charge, the plea cannot be voluntary . . ." *Id.*

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[2] *See also Evans v. Meyer*, 742 F.2d 371 (7th Cir. 1984). In *Evans*, the court, in holding that prejudice must be shown in cases where the defendant claims ineffective assistance of counsel due to counsel's failure to inform him of a defense, stated,

> Among other objections to holding [otherwise] is that it would create an exquisite conflict between the lawyer's duty to his client and to justice; for by holding back from his client some unimportant information about litigation options, the lawyer would guarantee that the client could get his guilty plea set aside as involuntary if he was dissatisfied with the sentence he received after pleading guilty.

Id. at 374.

The district court correctly rejected Creech's argument that his ignorance of the elements of first degree murder should invalidate his plea. It found that "Creech understood that malice or intent was an element of first degree murder at the time he pled guilty."

The state trial judge's colloquy with Creech at his August 28, 1981 plea hearing supports the district court's decision. In particular, the trial court asked Creech the following:

> Q (by the Court): What, as you understand it, does a person have to do to be guilty of the charge of first degree murder? What does it mean to you?
>
> A: He has got to think about doing it.
>
> Q: And killing someone.
>
> A: And killing someone.

Moreover, shortly after this exchange, the prosecution inquired as follows:

> Q (by Mr. Harris): Mr. Creech, did you intend to kill Mr. Jensen? . . .
>
> A: When I first had the fight with him, no. But the second time, yes, I did intend to kill him.
>
> Q: That was later in the day?
>
> A: Yes, sir.
>
> Q: Did you take action to kill him after he was no longer a threat to you? Was in no condition to hurt you?
>
> A: Yes, I did.
>
> Q: What did that include?

A: I kicked him in his throat and his head.

Q: Was that after he was unconscious?

A: He wasn't all the way unconscious, but he was down on the floor.

Therefore, on the basis of Creech's own testimony the district court correctly concluded that Creech understood that malice aforethought was an element of the charge.[3]

Second, with respect to Creech's claim that neither the court nor his attorney explained the defense of "imperfect self-defense," Creech argues that without such an explanation he did not have a full understanding of the law in relation to the facts. This issue was not addressed by the district court, although it found as a matter of fact that counsel did not discuss with Creech possible defenses to the murder charge.

In *Sober v. Crist*, 644 F.2d 807, 809 n.3 (9th Cir. 1981), we held that "[t]he accused should be made aware of possible defenses, at least where the attorney or court is made aware of facts that would constitute such a defense." Because Creech arguably could have claimed imperfect self-defense, he may have been prejudiced by his lack of knowledge.

The state argues, however, that the failure of counsel or the court to explain this defense constituted harmless error. *See United States v. Lopez*, 575 F.2d 681, 685 (9th Cir. 1978) (where a constitutional error is found, an appellate

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[3] Creech concedes that the quoted colloquy "[a]rguably . . . shows that Mr. Creech understood that premeditation was required for first degree murder."

court's duty is to reverse unless it is "able to declare a belief that it was harmless beyond a reasonable doubt.") (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

The State points to Creech's earlier murder convictions and his repeated attempts to interpose self-defense as a defense to those crimes as evidence that Creech knew of the possible defenses to the crime. Creech counters that nothing in the record shows that, relative to the Jensen murder, he had an understanding of this defense. Appellees also argue that any error was harmless because such a defense would have been contrary to the "overwhelming" evidence against Creech. In *Evans v. Meyer*, 742 F.2d 371 (7th Cir. 1984), the court opined that where uncontested facts make it inconceivable that a jury would acquit on the proposed defense, a plea entered without the defendant's knowledge of the defense can nevertheless be voluntary. *See also Hill*, 474 U.S. at 59 ("[W]here the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial").

After conducting our own review of the record in this case, we find it "inconceivable . . . , and not merely improbable . . . that [Creech] would have gone to trial on a defense of [imperfect self-defense], or that if he had done so he either would have been acquitted or, if convicted, would nevertheless have been given a shorter sentence than he actually received." *Evans*, 742 F.2d at 375. Even assuming his attorney's performance was not reasonable, we believe Creech's ignorance of the possible

defense of "imperfect self-defense" was harmless beyond a reasonable doubt.

IV

During his August 28, 1981 plea hearing, at Kehne's insistence, Creech reserved the right to withdraw his guilty plea if psychological evaluations showed Creech incompetent to plead guilty. Creech claims in his petition that the testimony of Doctors Stoner and Heyrend substantiate his claim of incompetence; consequently, he argues that he should be allowed to withdraw his plea.[4]

A defendant is not competent to plead guilty if "mental illness has substantially impaired his or her ability to make a reasoned choice among the alternatives presented to him and to understand the nature and consequences of his plea." *Sieling v. Eyman*, 478 F.2d 211, 215 (9th Cir. 1973).[5] The district court found that Creech failed to show that he was incompetent at the time he entered his guilty plea. Creech's central contention is that the district court

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[4] Respondent's assertion that this claim was not raised below is without merit.

[5] It is unclear whether a state court's determination of competency to plead guilty is entitled to a presumption of correctness under 28 U.S.C. § 2254(d). *Cf. Harding v. Lewis*, 834 F.2d 853, 856 (9th Cir. 1987), *cert. denied*, 488 U.S. 871 (1988) (trial court's conclusion of competence to *waive counsel* subject to de novo review); with *Evans v. Raines*, 800 F.2d 884, 887 (9th Cir. 1986)(competence to *stand trial* is a factual issue entitled to the presumption). Regardless of whether the presumption of correctness attaches here, Creech's claim is without merit.

erred in this finding because it applied the wrong standard. Contrary to Creech's assertion, however, it is apparent from the opinion below that the district court simply concluded that there was no evidence that Creech was incompetent to plead guilty.

We affirm the district court's conclusion regarding Creech's competency to plead guilty. Contrary to Creech's assertion, Dr. Heyrend did not conclude that Creech could not appreciate the consequences of decisions such as waiving legal rights. When asked, "Do you have any information or evidence to indicate to your satisfaction that at the time of the defendant's plea in this case, that he did not intend to plead guilty or did not recognize the consequences of that legal act?," Dr. Heyrend replied, "I really have no information in that area." While Dr. Stoner was more supportive of Creech's position, even he admitted, "I think there's room to be more certain than I am in this case." Creech failed to show that he was incompetent to plead guilty.

V

Creech next claims that his rights to confrontation was violated because he had no meaningful opportunity to cross-examine the sources of information contained in his presentence report. At Creech's January, 1982 sentencing hearing, Judge Newhouse took judicial notice of the presentence report, which included reports from several Idaho psychiatrists, a previous presentence report from an Ohio conviction containing reports from Ohio psychologists, psychiatric evaluations from Oregon doctors, and numerous newspaper articles and editorials. The Idaho

Supreme Court in *Creech I* found that all the material in the presentence report was considered by the sentencing judge. 670 P.2d at 468.

The trial judge at sentencing may appropriately conduct a broad inquiry largely unlimited as to the kind of information to be considered or the source of such information. *United States v. Grayson*, 438 U.S. 41, 50 (1978). The Supreme Court in *Williams v. New York*, 337 U.S. 241 (1949), expressly approved of a sentencing court's reliance on information contained in a presentence report in imposing a death sentence. The Court wrote that "most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination." *Id.* at 250.[6]

Neither the district court nor the Idaho Supreme Court addressed the claim that Creech was denied an opportunity to rebut or explain the testimony contained in the presentence report. The only reference to this issue is Judge Huntley's dissent in *Creech I* which stated that Creech could not rebut the information in the presentence report through the device of cross-examination. 670 P.2d at 480 n.1 (Huntley, J., dissenting). It is apparent, however, that Creech had the opportunity, other than through cross-examination, to dispute the accuracy of the presentence report prior to and at his January, 1982 sentencing

[6] The Idaho Supreme Court in *Creech I* held that Creech had no right under Idaho law to a presentence report containing only testimony from live witnesses subject to cross-examination. 670 P.2d at 466-469.

hearing because his counsel was given the report prior to the sentencing hearing.

Because Creech had the opportunity to rebut, deny or explain the information contained in the presentence report, this case is distinguishable from *Gardner v. Florida*, 430 U.S. 349, 356 (1977), and is in line with *Williams v. New York*, 337 U.S. 241 (1949).[7] In *Gardner*, the Court ruled that the defendant was denied due process of law when the death sentence was imposed on the basis of information never disclosed to him. 430 U.S. at 362 (plurality opinion). *Gardner* relied on the absence of *any* opportunity for counsel to challenge the accuracy of information contained in a presentence report. *Id.* at 356 (distinguishing *Williams*), 358-62. We conclude that Creech's right to confrontation was not violated in this case.

[7] Although Creech is correct in asserting that in *Williams* the sentencing judge stated the facts upon which it was relying in open court, the opportunity to rebut, explain or deny the information contained in the presentence report was nevertheless available both in *Williams* and in this case. In fact, Creech had more time in which to examine the report and refute its inaccuracies than did the defendant in *Williams*, who learned of the information at the sentencing hearing itself. The state trial court in this case specifically found that Creech had access to the report for at least seven days prior to his sentencing hearing, as required by Idaho law.

Creech argues that due to *Gardner*, *Williams* is no longer good law. Although *Gardner* stated that standards of procedural fairness had evolved since *Williams* was decided, it distinguished rather than overruled *William's* holding. *Gardner*, 430 U.S. at 356.

VI

Creech claims that he is entitled to a new sentencing hearing due to the trial court's unconstitutional application of the Idaho sentencing statute, Idaho Code § 19-2515. Creech alleges three errors: (1) the trial court refused to allow him to present any mitigating evidence at his March 17, 1983 resentencing hearing in violation of the Eighth and Fourteenth Amendments; (2) at his sentencing hearing, the court found two aggravating circumstances without making a required finding beyond a reasonable doubt; and (3) one of the aggravating circumstances applied by the trial court, that Creech demonstrated an "utter disregard for human life", is unconstitutionally vague. Creech argues that due to these errors, an improper balance of aggravating and mitigating circumstances resulted. We address each contention in turn.

A

The Idaho Supreme Court vacated Creech's original sentence of death because the trial judge failed to pronounce the sentence in the presence of the defendant as required by Idaho law. The court ordered resentencing to occur within fourteen days from the date of its order. Creech argues that he did not have an opportunity to introduce mitigating testimony relating to his conduct during the fourteen months between his sentencing and resentencing hearings. This new mitigation evidence would have included testimony by prison guards and spiritual advisors about Creech's good behavior in prison, his personal growth and increased sensitivity, and

his writing and recording of a song for a young girl badly injured in an automobile accident.

Upon remand, the trial court simply read the sentence of death to Creech. This second sentence of death was affirmed in *Creech I*, 670 P.2d at 476. The district court found "no constitutional provision which would require the state courts to again conduct the full sentencing hearing at which Creech could present mitigating circumstances."

Creech asserts that although he was allowed to present any and all mitigating evidence at his initial sentencing hearing, because the Supreme Court of Idaho voided that sentence and ordered resentencing, constitutionally he must be allowed another opportunity to do so. He argues that the resentencing hearing was not ordered simply to correct a procedural defect. In addition, he contends that in capital resentencing hearings, a defendant must be allowed to present mitigating evidence to ensure the reliability of death sentences.

This argument appears to be correct. In *Sivak v. State*, 731 P.2d 192 (Idaho 1986), the Idaho Supreme Court ruled on the precise claim presented here. The court found that an order *identical* to the one at issue here, issued to the *same judge* (Judge Newhouse), and based on the *same error* as present here mandated that the trial judge permit the introduction of new mitigating evidence at the resentencing hearing.

The *Sivak* court held that evidence of a defendant's good behavior and peaceful adjustment while in prison was mitigation evidence, *id.* at 196-97, and that the principles of *Lockett v. Ohio*, 438 U.S. 586 (1978), *Eddings v.*

Oklahoma, 455 U.S. 104 (1982), and *Skipper v. South Carolina*, 476 U.S. 1 (1986), required that a defendant be allowed to offer such mitigating evidence at resentencing. *Sivak*, 731 P.2d at 197. The Idaho Supreme Court's discussion is highly persuasive.

Like the Idaho Supreme Court, *id.*, we see no rational basis for distinguishing the evidence of a defendant's good conduct while awaiting trial and sentencing, and evidence of a defendant's good conduct pending review of a death sentence which is vacated on appeal. On this basis, we reverse and remand with instructions to grant the petition. The writ shall order Creech's release if, within a reasonable time set by the district court, Idaho fails to vacate Creech's sentence and provide Creech with a resentencing hearing at which he can present any and all mitigating evidence that exists at the time of the hearing.

B

Creech claims that the trial court applied two aggravating circumstances without making a required finding. The trial court found as aggravating circumstances that "defendant was under a sentence for Murder of the First Degree at the time of his actions" and that "defendant committed the murder on a fellow inmate while both were incarcerated in the Idaho State Correctional Institution." Each is an element of the crime of first degree murder for which Creech was charged. *See* Idaho Code § 18-4003(c),(e) (1987).

To properly constitute aggravating circumstances under Idaho law, the elements contained in sections

18-4003 (c) and (e) must be combined "with the specific intent to cause . . . death of a human being." Idaho Code § 19-2515 (g)(7) (1987). Creech argues that Judge Newhouse failed to find such an intent beyond a reasonable doubt; therefore, he asserts, the judge listed these aggravating circumstances without determining if they should apply.[8]

We find that there is evidence by which Judge Newhouse could have concluded that Creech had specific intent. At the time he pleaded guilty, Creech admitted that he intended to kill Jensen.[9] Nevertheless, Judge Newhouse's Findings fail to indicate that he found specific intent beyond a reasonable doubt before applying section 19-2515 (g)(7).[10] On remand, the district court shall grant the petition. The writ shall order Creech's release if the state judge at resentencing applies the

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[8] Creech originally argued, relying on *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied*, 474 U.S. 1013 (1985), that the sentence was unconstitutional because these two aggravating factors were nothing more than elements of first degree murder. Acknowledging that *Collins* has been overruled, *see Perry v. Lockhart*, 871 F.2d 1384, 1392 (8th Cir.), *cert. denied*, 110 S. Ct. 378 (1989) Creech no longer makes this argument.

[9] In response to the State's question of whether he intended to kill Jensen, Creech replied, "When I first had the fight with him, no. But the second time, yes, I did intend to kill him."

[10] Not only did Judge Newhouse fail to mention specific intent in his listing if these aggravating circumstances, he also found that Jensen instigated the fight and that Creech's actions evidenced "an excessive violent rage." His only findings of intent were "The murder, once commenced, *appears* to have been an intentional, calculated act." (emphasis added)

aggravating circumstances under this section without making a finding of specific intent.

C

Creech claims that the statutory aggravating circumstance, that "the defendant exhibited utter disregard for human life," Idaho Code § 19-2515 (g)(6), is unconstitutionally vague. Recently, the Supreme Court announced the process by which we review such a challenge. In *Walton v. Arizona*, 110 S. Ct. 3047, 3057 (1990), the court held:

> When a federal court is asked to review a state court's application of an individual statutory aggravating or mitigating circumstance in a particular case, it must first determine whether the statutory language defining the circumstance is itself too vague to provide any guidance to the sentencer. If so, then the federal court must attempt to determine whether the state courts have further defined the vague terms and if they have done so, whether those definitions are constitutionally sufficient, *i.e.*, whether they provide *some* guidance to the sentencer.

Applying *Walton*, we first conclude that the aggravating circumstance listed in section 19-2515 (g)(6) is unconstitutionally vague. Idaho defines murder as "the unlawful killing of a human being with malice aforethought." Idaho Code § 18-4001 (1987). In section 18-4003, Idaho separates murder into first and second degree. Only those convicted of first degree murder are

statutorily eligible to be sentenced to death. Idaho Code § 18-4004 (1987). Given that some defendants who kill with malice aforethought are not even eligible to be sentenced to death, we fail to see how the aggravating circumstance of "the utter disregard for human life" permits "the sentencer to make a principled distinction between those who deserve the death penalty and those who do not." *Lewis v. Jeffers*, 110 S. Ct. 3092, 3099 (1990).

In *State v. Osborn*, 631 P.2d 187 (Idaho 1981), the Idaho Supreme Court also recognized the infirmity of section 19-2515 (g)(6). The court held, "it is . . . apparent under *Godfrey* that this court must place a limiting construction upon [the "utter disregard"] aggravating circumstance[ ] so as to avoid the possibility of [its] application in an unconstitutional manner." 631 P.2d at 200 (citing *Godfrey v. Georgia*, 446 U.S. 420 (1980)). We therefore analyze, under the second step of *Walton*, whether the aggravating circumstance, as construed by the Idaho Supreme Court at the time Creech was sentenced, was unconstitutionally vague.[11]

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[11] Creech argues that we may not review the limiting construction because it was not explicitly applied by the trial judge. The Supreme Court's words in *Walton*, however, are instructive:

> When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face. That is the import of our holdings in *Maynard* and *Godfrey*. But the logic of those cases has no place in

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The Supreme Court has found that aggravating circumstances must "channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance and that make rationally reviewable the process for imposing a sentence of death." *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (quotations and footnotes omitted). "[T]he channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988).

Given this standard, we find that the narrowing construction of section 19-2515 (g)(6), as applied to Creech, was unconstitutionally vague. Having concluded that the statutory language "the defendant exhibited utter disregard for human life" was too vague, the Idaho Supreme Court limited it by stating "the phrase is meant to be reflective of acts or circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer." *Osborn*, 631 P.2d at 201.[12]

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the context of sentencing by a trial judge. Trial judges are presumed to know the law and to apply it in making their decisions.

Walton, 110 S. Ct. at 3057. Although the trial judge used the language of the statute, we follow the Supreme Court's lead and presume that he applied the limiting instruction.

[12] The Idaho Supreme Court also noted that,

To properly define [the "utter disregard"] circumstance, it is important to note the other aggravating

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This limiting construction gives no more guidance than the statute. Rather than defining "utter disregard," the court in *Osborn* merely emphasized it. But the problem with the "utter disregard" standard is not that it is too low a threshold, it is that it is unclear. Idaho's limiting construction does not resolve this infirmity. Just as it is difficult to determine what constitutes "utter disregard for human life," it is unclear what constitutes "the highest, the utmost, callous disregard for human life." The Supreme Court noted in *Cartwright*, 486 U.S. at 364, that the "contention that the addition of the word 'especially'

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circumstances with which this provision overlaps. The second aggravating circumstance, I.C. § 19-2515 (f)(2), that the defendant committed another murder at the time this murder was committed, obviously could show an utter disregard for human life, as could the third aggravating circumstance, I.C. § 19-2515 (f)(3), that the defendant knowingly created a great risk of death to many persons. The same can be said for the fourth aggravating circumstance, I.C. § 19-2515 (f)(4), that the murder was committed for remuneration. Since we will not presume that the legislative intent was to duplicate any already enumerated circumstance, thus making I.C. § 19-2515 (f)(6) mere surplusage . . . , we hold that the phrase "utter disregard" must be viewed in reference to acts other than those set forth in I.C. §§ 19-2515 (f)(2), (3), and (4).

Rather than explaining what "utter disregard for human life" means, this passage merely recognizes that the legislature must have meant it to mean something other than the preexisting aggravating circumstances. Since none of these aggravating circumstances are at issue, this language does not help us to determine the meaning of "utter disregard."

somehow guides the jury's discretion, even if the term 'heinous' does not, is untenable." *Cartwright's reasoning appears to apply here.*

Godfrey speaks of "clear and objective" standards. The Court has approved limiting constructions that have defined the terms of the statutory aggravating circumstance through objective standards. In *Walton v. Arizona*, 110 S. Ct. 3047, 3057 (1990) the Court upheld an aggravating factor of "especially heinous, cruel or depraved" when it noted that the aggravating factor had the following limitations: "[A]n especially cruel manner [is] when the perpetrator inflicts mental anguish or physical abuse before the victim's death," *id.* at 3057, and "an especially 'depraved' manner [is] when the perpetrator 'relishes the murder, evidencing debasement or perversion,' or 'shows an indifference to the suffering of the victim and evidences a sense of pleasure' in the killing." *Id.* at 3058.

In *Cartwright*, 486 U.S. 356, the Court affirmed the Tenth Circuit's conclusion that Oklahoma's aggravating circumstance of "especially heinous, atrocious or cruel" was still unconstitutionally vague even though Oklahoma had defined "heinous" as "extremely wicked or shockingly evil" and had defined "atrocious" as "outrageously wicked and vile,"[13] According to the circuit court, "Vague terms do not suddenly become clear when they are defined by reference to other vague terms." *Cartwright v. Maynard*, 822 F.2d 1477, 1489 (10th Cir. 1987). The Court

[13] Recently, the Supreme Court reaffirmed its holding in *Cartwright* in the context of an identical Mississippi aggravating factor with the same limiting constructions. *Shell v. Mississippi*, 111 S.Ct. 313 (1990).

agreed with the Tenth Circuit, however, that a limiting instruction of "some kind of torture or physical abuse", while not the only permissible construction, would have made the aggravating circumstance constitutional.[14]

Unlike those cases, where the sentencer could make an objective determination of whether specific acts occurred, the Idaho limiting construction calls for a subjective determination of whether the defendant is a "cold-blooded, pitiless slayer." The limiting construction therefore fails to channel the sentencer's discretion.

The vagueness of the *Osborn* limiting construction is apparent by its application in this case. In his Findings in sentencing Creech to death, Judge Newhouse found that Creech "did not instigate the fight with the victim, but the victim, without provocation, attacked him. He is initially justified in protecting himself." While he found that "[a]fter the victim was helpless the defendant killed him," Judge Newhouse also noted that the murder "evidenc[ed] an excessive violent rage."[15] Given these factual findings, we cannot agree with the conclusion that by the murder itself, or circumstances surrounding its commission, Creech demonstrated that he was a cold-blooded

[14] *See also, Proffit v. Florida*, 428 U.S. 242, 255 (1976) (approving "especially heinous, atrocious or cruel" limited to "the conscienceless or pitiless crime which is unnecessarily torturous to the victim.").

[15] Judge Newhouse also found that "The murder, *once commenced*, appears to have been an intentional, calculated act." (emphasis added).

pitiless killer.[16] We therefore find the Idaho limiting construction is unconstitutionally vague.

D

We have found that one of the five statutory aggravating circumstances cited by Judge Newhouse, that Creech exhibited utter disregard for human life, is unconstitutionally vague. Second, we have found that two additional aggravating circumstances were applied without the required finding of specific intent. Finally, we have found that Creech must be given an opportunity to provided any additional mitigating evidence.

Idaho Code section 19-2515 (c) holds that a sentence of death may not be imposed unless the court finds at least one statutory aggravating circumstance. Even with our findings today, this requirement has been met. Section 19-2515 (c) goes on, however, and requires a balancing of mitigating and aggravating circumstances. Given our findings, the weight of both types of factors is apt to

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[16] In its briefs, the State argues that "utter disregard" is sufficiently specific, as it applies only to calculated murders. According to the State, "[M]urders that result from a strong provocation or objectively reasonable emotional distress are not comprehended by [the section]." If this is what the limiting construction means, then it was improperly applied to Creech. While the State argues that "Creech cold-bloodedly contrived the murder of David Jensen", this was not the finding of the trial court. *See Creech I*, 670 P.2d at 465 ("There is some evidence in the record indicating that Creech had been enticed by other inmates to 'do Jensen in,' but the district judge did not decide or find that the murder had been performed on contract or by plan."

change. Thus, we cannot rely on the trial court's conclusion that Creech deserved the death penalty. *See Clemons v. Mississippi*, 110 S. Ct. 1441, 1450 (1990); *Cartwright v. Maynard*, 822 F.2d 1477, 1483 (10th Cir. 1987) ("A death sentence that is imposed pursuant to a balancing that included consideration of an unconstitutional aggravating circumstance must be vacated under the Eighth and Fourteenth Amendments."), *aff'd*, 486 U.S. 356 (1988).

We therefore reverse and remand with instructions to grant the petition. The writ shall order Creech's release unless, within a reasonable time set by the district court, the Idaho court balances the remaining, constitutionally valid aggravating and mitigating factors in order to determine whether Creech should be sentenced to death.

VII

Creech claims that the Constitution guarantees a jury trial on the existence of aggravating circumstances which may result in the imposition of a sentence of death. Creech draws the following analogy: some of the aggravating circumstances found by the state court are facts analogous to elements of the crime of "capital murder" and must be proven beyond a reasonable doubt; therefore, a jury must determine their existence.

In rejecting Creech's claim, the district court relied on *Spaziano v. Florida*, 468 U.S. 447 (1984). In *Spaziano*, the Supreme Court rejected the argument that "placing responsibility on the trial judge to impose the sentence in a capital case is unconstitutional." *Id.* at 464. Creech attempts to distinguish *Spaziano* and similar Supreme

Court cases by asserting that while the exercise of discretion in sentencing may remain with the trial judge, the jury must find the existence of facts, such as aggravating circumstances.

Creech's argument has been fully rejected by the Supreme Court. In *McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986), the Court wrote that "[s]entencing courts have traditionally heard evidence and found facts . . . . " The Court further opined that the claim that a jury must find sentencing considerations "merits little discussion." *Id.* at 93. The Court ultimately held in *McMillan* that "there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact." *Id.* (citing *Spaziano*).

More recently, the Court specifically held in *Hildwin v. Florida*, 109 S. Ct. 2055, 2057 (1989) that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *See also Walton v. Arizona*, 110 S. Ct. 3047, 3054 (1990). We therefore find that consistent with these cases, Creech had no constitutional right to a jury trial on the existence of aggravating circumstances.

VIII

Creech claims that the Idaho capital sentencing scheme violates the Eighth Amendment because it provides a mandatory sentencing formula. Specifically, Creech argues that Idaho Code § 19-2515(c) is unconstitutional. Section 19-2515(c) provides:

> "[w]here a person is convicted of an offense which may be punishable by death, a sentence

> of death shall not be imposed unless the court finds at lease one (1) statutory aggravating circumstance. Where the court finds a statutory aggravating circumstance the court *shall* sentence the defendant to death *unless* the court finds that mitigating circumstances which may be presented *outweigh* the gravity of any aggravating circumstance found and make imposition of death unjust.

Idaho Code § 19-2515(c) (1987) (emphasis added).

The basis of Creech's contention is that the Idaho courts *shall* apply the death penalty *unless* mitigating circumstances outweigh the aggravating circumstances and make the imposition of death unjust. Idaho Code § 19-2515(c) (1987). Creech claims this removes an "individualized determination" and a "moral response" in sentencing.

Appellees argue that the Idaho sentencing scheme is valid because it permits the sentencing court to consider all relevant mitigating evidence, consistent with *Lockett v. Ohio*, 438 U.S. at 602-08. In addition, appellees note that the statute places upon the state the burden of proof to show at least one statutory aggravating circumstance beyond a reasonable doubt, thus fulfilling the "narrowing function" required by *Zant v. Stephens*, 462 U.S. 862, 877 (1983). As construed by the Idaho Supreme Court, moreover, appellees point out that the defendant's burden with respect to mitigating circumstances is not one of persuasion but, rather, one of "rais[ing] any factors which might possibly tend to mitigate his culpability for the offense." *State v. Osborn*, 631 P.2d 187, 199 (1981).

This issue has been recently resolved by the Supreme Court. In *Blystone v. Pennsylvania*, 110 S. Ct. 1078 (1990), the Court rejected a challenge to a similar requirement, holding that such a statute is not "impermissibly mandatory", *id.* at 1082, and that "[t]he requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence." *Id.* at 1083. Similar statutes have been upheld in other cases. *See Boyde v. California*, 110 S. Ct. 1190 (1990); *Walton*, 110 S. Ct. 3047. We therefore find that section 19-2515(c) is constitutional.

IX

Creech finally claims that we should remand this case to the district court because the district court improperly limited its evidentiary hearing on his petition. Under *Townsend v. Sain*, 372 U.S. 293, 312-13 (1963), a district court must hold an evidentiary hearing if (1) the petitioner's allegations, if proved, would entitle him to relief, and (2) the state court trier of fact has not, after a full and fair hearing, reliably found the relevant facts. An evidentiary hearing must be held if, for example, state court fact-finding procedures were inadequate, or the material facts were not adequately developed at the state court hearing. *Id.* at 313.[17] Creech's claim with respect to

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[17] Under *Townsend*, 372 U.S. at 313:

> [A] federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual

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the legal requirement of an evidentiary hearing is twofold.

First, although Creech admits that he addressed each factual issue in his February 1984 state post-conviction plea withdrawal hearing, he claims that hearing was inadequate because he was given only two weeks to file all his post-conviction collateral state proceedings and two additional weeks to fully prepare for the hearing. Consequently, Creech argues that an evidentiary hearing under *Townsend* was required on several claims presented to the district court.

The district court's opinion does not address this claim. Further, Appellees do not address Creech's allegations and the only evidence on this claim is the self-serving affidavit of Creech's counsel. The Idaho Supreme Court opinion in *Creech II*, 710 P.2d 502 (1985), however, addresses the precise issue raised by Creech. Creech's death sentence was affirmed by the Idaho Supreme Court on May 23, 1983 and it was not until January 24, 1984 that Creech was ordered to make his final post-conviction challenges. *Id.* at 507. Consequently, counsel's complaint

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> determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

that he had only four weeks to prepare his case is not accurate.

In justifying the limited time afforded Creech to make his final post-conviction challenges, the Idaho Supreme Court in *Creech II* relied on *Barefoot v. Estelle*, 463 U.S. 880, 889 (1983), for the proposition that "the use of summary procedures for the expeditious resolution of collateral proceedings in death penalty cases" is proper. 710 P.2d at 507. In *Barefoot*, the Supreme Court cited its prior cases which approved the summary procedures adopted by the Circuit Courts of Appeal for the disposition of habeas appeals on the merits before the scheduled date of execution. 463 U.S. at 889.

Creech has had a full and fair opportunity to present the relevant facts of his claims. Counsel had more than enough time between the affirmance of Creech's death sentence and the deadline for filing of post-conviction challenges to prepare any post-conviction claims for relief. Consequently, we hold that Creech is not entitled to an evidentiary hearing on his basis.

Creech's second argument is that the state court did not issue written findings on his claims that he was suicidal when he entered the guilty plea and that his plea was motivated by threats against his family. Therefore, Creech argues the district court could not have concluded that these issues were reliably determined by the state trier of fact and an evidentiary hearing is required.

The district court found that "[t]here is nothing in the record to suggest Creech was suicidally depressed at the time he entered his plea of guilty," and that Creech's "self-serving testimony" with respect to threats against

his family was insufficient to invalidate his plea. Although the district court did not make this point clear, it must have made these determinations without an evidentiary hearing based on the implied findings of the state trier of fact. Under *Townsend*, state court factual determinations may be implied from the actions taken by the state court. *See Townsend*, 372 U.S. at 314; *Butcher v. Marquez*, 758 F.2d 373, 376 (9th Cir. 1985). For example, "[w]hen a state trial court holds a hearing to suppress evidence and rules on the motion, a federal district court may assume that the state court found the facts necessary to support the state court's decision, unless there is some indication that the state court applied an incorrect legal standard." *Knaubert v. Goldsmith*, 791 F.2d 722, 727 (9th Cir.), *cert. denied*, 479 U.S. 867 (1986).

In the instant case, it appears from the state trial court's February, 1984 denial of Creech's motion to withdraw his plea that Judge Newhouse implicitly rejected the factual circumstances that Creech alleges invalidate his plea and that Creech asserts require an evidentiary hearing. Moreover, although the state trial court did not issue written findings concerning the February, 1984 withdrawal hearing,[18] the Idaho Supreme Court, in affirming the state trial court in *Creech II*, held that Creech offered no evidence other than his own assertions to support either of his arguments. *Cf. Sumner v. Mata*, 449 U.S 539, 546-47 (1981) (28 U.S.C. § 2254(d) presumption of correctness of state court findings applies equally

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[18] The state trial court found only that it would not be manifestly unjust to deny Creech's motion to withdraw the guilty plea.

to state trial court and state appellate court fact-finding). We affirm the district court's denial of an evidentiary hearing on these issues.

Creech also contends that a remand is required because he did not have an opportunity to present evidence on the medication issue to the district court. Creech argues he should have been granted a continuance in order to prepare for an evidentiary hearing. A district court's decision regarding a motion for a continuance is reviewed for an abuse of discretion. *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964).

The district court found that Creech did not "advise the court that notification of the parties on May 22, 1986, as to the nature and scope of the May 29th hearing would not provide counsel with adequate time to prepare for that hearing." Moreover, the district court found that Creech's own delinquency culminated in the limited period of time between the deadline for briefing and the May 29th hearing date. Further, Creech's counsel admitted as much at the May 29th hearing, stating "I frankly am not prepared to present medical evidence today and . . . that was my confusion and it was my fault. . . . "

Creech was given one week's notice of the nature and scope of the evidentiary hearing. In conjunction with Creech's delinquency and the amount of time for Creech to prepare his case between the filing of the habeas petition on January 29 and the May 29 hearing (not to mention the four years between Creech's initial sentencing on January 25, 1982 and the filing of his petition), we conclude that the district court did not abuse its discretion in denying Creech a continuance.

X

We AFFIRM the district court on Creech's claims of ineffective assistance of counsel, incompetence to plead guilty, involuntary and unknowing guilty plea, denial of his right to confrontation, and need for an evidentiary hearing. We also AFFIRM the district court's conclusion that Creech had no right to a jury trial on the existence of aggravating factors and that he was not sentenced pursuant to a mandatory death penalty formula. We REVERSE and direct the district court to grant the petition on Creech's claim that the state trial court relied on improper aggravating circumstances, and that prohibiting him from introducing evidence of mitigating circumstances at his resentencing hearing violates the Constitution.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

TROTT, Circuit Judge dissenting from the order denying rehearing en banc. KOZINSKI and T. G. NELSON joining.

I respectfully dissent from the court's refusal to rehear this case en banc, and I do so because I disagree with the panel's analysis in Part C.

Thomas Creech is a killer. He personifies an "utter disregard for human life." In this case, with the intent to kill, he beat a fellow inmate to death while serving a life sentence in Idaho for murder. The Idaho Supreme Court has made the following statement about him:

> The defendant here committed murder at least four times prior to the instant offense,

twice in Idaho and also in Oregon and in California. There presently exist other pending charges of murder in the first degree against him. The testimony of an eyewitness to one of Creech's previous murders, coupled with psychiatric evidence, tends to prove that the appellant is violent and vengeful and that he experiences no remorse for his actions. Letters written by Creech to law enforcement personnel detail numerous alleged murders beyond those for which he has already been convicted and intimate his intentions to kill in the future. Creech's own statements claim responsibility for approximately 40 murders. However vague the statutory language might be argued to be in the ordinary case (which assertion we have already rejected), nevertheless, as applied in the instant case, we hold beyond any doubt whatsoever that the appellant here has exhibited a propensity to commit murder which will probably constitute a continuing threat to society.

State v. Creech, 670 P.2d 463, 472 (Idaho 1983).

My concern however, is not so much that Creech's sentence is being returned to Idaho's courts to be redone as it is with a serious and possibly irremediable error made by the panel in holding that one of the statutory aggravating factors relied on by Idaho to sentence him to death is unconstitutionally vague. The error may effectively be irremediable because if Creech is resentenced to death in state court in accord with the orders of the panel's opinion, and the case then resurfaces in federal court, which is probable, it will most certainly do so on the basis of different aggravating circumstances. Thus, unless the error is attended to now, Idaho may be blocked

from ever bringing this error – which now becomes the binding law of our circuit as to this aggravating circumstance – to the attention of any court for correction. This is also true if Creech is not resentenced to death and the question of capital punishment disappears from future federal actions filed by him. As it now stands we have failed to accord appropriate deference to the Idaho Supreme Court decision in *Osborn*, and we have thereby improperly amputated a legislative enactment of a sovereign state.

To be specific as to the nature of the error, I believe the panel has misapplied the holding of the Supreme Court in *Walton v. Arizona*, 110 S. Ct. 3047, 3057 (1990) in such a way as to bring about one application of the *Walton* test for Arizona, and a different application of the same test for Idaho. The panel's misapplication of the test violated the unremarkable precept that federal law, and especially Constitutional law, shall be uniformly applied.

The aggravating circumstance in question is that "by the murder or circumstance surrounding its commission the defendant exhibited utter disregard for human life." Idaho Code § 19-2515(g)(6). I would agree with the panel that this *bare* language is thin under *Walton*, but I respectfully but strongly disagree with the panel's conclusion that the limiting construction placed on this language by the Idaho Supreme Court in *State v. Osborn*, 613 P.2d 187 (Idaho 1981) falls short of the mark established by the United States Supreme Court in *Godfrey v. Georgia*, 446 U.S. 420 (1980). The Idaho Supreme Court in *Osborn* explicitly recognized its duty under *Godfrey* and *Gregg v. Georgia*, 428 U.S. 153 (1976) to define vague terms so as to

give adequate guidance to the sentencer. On this issue, Idaho's highest court spoke as follows:

> A similar limiting construction must be placed upon the aggravating circumstances in I.C. § 19-2515(f)(6)[1], that "[b]y the murder, or the circumsantces surrounding its commission, the defendant exhibited utter disregard for human life." To properly define this circumstance, it is important to note the other aggravating circumstance with which this provision overlaps. The second aggravating circumstance, I.C. § 19-2515(f)(2), that the defendant committed another murder at the time this murder was committed, obviously could show an utter disregard for human life, as could the third aggravating circumstance, I.C. § 19-2515(f)(3), that the defendant knowingly created a great risk of death to many persons. The same can be said for the fourth aggravating circumstance, I.C. § 19-2515(f)(4), that the murder was committed for remuneration. Since we will not presume that the legislative intent was to duplicate any already enumerated circumstance, thus making I.C. § 19-2515(f)(6) mere surplusage (*See, e.g., Norton v. Dept. of Employment*, 94 Idaho 924, 500 P.2d 825 (1972)), we hold that the phrase "utter disregard" must be viewed in reference to acts other than those set forth in I.C. § 19-2515(f)(2), (3), and (4). We conclude instead that the phrase is meant to be reflective of acts or circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer. With such an interpretation, it is our conclusion that this

[1] Section 19-2515(f)(6) is now section 19-2515(*g*)(6).

> aggravating circumstance meets the constitutional requirements set forth by the United States Supreme Court. Upon remand, the district court should, in accordance with his opinion and the provisions of I.C.R. 33.1 and 33.2 (enacted subsequent to original sentencing in this case), specifically set forth the facts and reasoning underlying the finding, if any, that a statutory aggravating circumstance exists.

State v. Osborn, 631 P.2d at 200-201.

Under the *Walton* rule, this not only gives "*some* guidance," *Walton*, 110 S. Ct. at 3057, it gives substantive guidance. It defines "utter disregard," in greater detail than the statute itself, and it goes farther by telling the sentencer that he or she cannot infer "utter disregard" solely from the fact that the defendant has committed multiple murder, nor can it be inferred solely from a murder for hire, nor can it be inferred solely from the fact that the defendant knowingly created a risk of death to many persons.

Idaho's "utter disregard" factor as focused by *Osborn* is indistinguishable from the aggravating circumstance approved by the Supreme Court in *Walton*:

> 'especially depraved' [i.e.], when the perpetrator 'relishes the murder, evidencing debasement or perversion,' or 'shows an indifference to the suffering of the victim and evidence a sense of pleasure in the killing.'

Walton, 110 S. Ct. at 3058 (citation omitted). How "objective" is "relishing the murder, evidencing debasement or perversion"? How is that different from evidencing an "utter disregard for human life," defined as intentional,

cold-blooded, and without pity, and as requiring more than just mass murder, murder for hire, and endangering many people? This is not just "wicked and vile," as in *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988), which are simply pejorative adjectives that broadly describe the crime. This is "utter, callous, cold-blooded, and pitiless disregard for human life," which is a standard that can be proved with facts and circumstances. "Cold-blooded" means carried out without feeling or emotion. "Pitiless" means without compassion for suffering. Contrary to the panel's assertion, Idaho does *not* call for a purely "subjective determination" of whether a defendant is a "cold-blooded, pitiless slayer." Idaho requires an *evidentiary* determination supported by facts and circumstances.

Such a determination under Idaho law must be set out in writing, and it is subject to scrupulous appellate review.

Idaho Code § 19-2525(e) states:

> Upon the conclusion of the evidence and arguments in mitigation and aggravation the court shall make written findings setting forth any statutory aggravating circumstances found. Further, the court shall set forth in writing any mitigating factors considered and, if the court finds that mitigating circumstances outweigh the gravity of any aggravating circumstance found so as to make unjust the imposition of the death penalty, the court shall detail in writing its reasons for so finding.

About this section, the Idaho Supreme Court has said:

I.C. § 19-2515(d)[2] is mandatory in its terms: "the court *shall* set forth in writing any mitigating factors considered." The reasoning behind a similar statutory requirement for specific written findings was explained by the Florida Supreme Court:

> "The fourth step required by Fla. Stat. § 921.141. F.S.A., is that the trial judge justifies his sentence of death in writing, to provide the opportunity for meaningful review by this Court. Discrimination or capriciousness cannot stand where reason is required, and this is an important element added for the protection of the convicted defendant. Not only is the sentence then open to judicial review and correction, but the trial judge is required to view the issue of life or death within the framework of rules provided by the statute." *State v. Dixon*, 283 So.2d 1, 8 (Fla. 1973) *cert. den.* 416 U.S. 943, 94 S. Ct. 1951, 40 L.Ed.2d 295 (1974).

> We feel the requirement of written and detailed findings serves a dual purpose. Initially it focuses the attention of the sentencing court upon all the information before it and requires a *thorough and reasoned analysis of all relevant factors.* This helps assure that the imposition of the sentence of death is reasoned and objective as constitutionally required. It also serves the purpose, as noted by the Florida Supreme Court, of making the process for imposing death rationally reviewable. *On review, if the mandated of I.C. § 19-2515(d) are met, we can determine whether the lower court overlooked or ignored any raised mitigating factors, whether the evidence supports the*

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[2] Section 19-2515(d) is now section 19-2515(*e*).

> *aggravating factors found, and finally whether the court has properly weighed all factors.* If the findings of the lower court are not set forth with reasonable exactitude, this court would be forced to make its review on an inadequate record, and could not fulfill the function of "meaningful appellate review" demanded by the decisions of the United States Supreme Court.

Osborn, 631 P.2d at 196-197 (emphasis added). These strict requirements add considerable substance to the process and coral the possibility of excessive subjectivity.

The Idaho Supreme Court was careful to verify the factual basis for the pertinent findings. The Supreme Court said:

> We turn now to *whether the sentencing judge complied with those statutory provisions.* Appellant argues that the court erred in finding beyond a reasonable doubt that the defendant has previously been convicted of other murders; that the defendant had exhibited utter disregard for human life and a propensity to commit murder; that the defendant was under sentence for first degree murder at the time of his actions; and that both defendant and his victim were inmates at the state penitentiary when the crime occurred. *We have reviewed the record and hold that the evidence at the sentencing hearing clearly supports the trial court's findings of aggravating and mitigating circumstances.*

Creech, 670 P.2d at 470.

Furthermore, Idaho Code § 19-2827 requires the Idaho Supreme Court to verify proportionality and to screen out passion, prejudice, and arbitrariness with

respect to *all* sentences of death. This section reads in relevant part as follows:

> (a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Idaho. The clerk on the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Idaho and to the attorney general together with a notice prepared by the clerk and a report prepared by the trial judge setting forth the findings required by section 19-2515(d), Idaho Code, and such other matters concerning the sentence imposed as may be required by the Supreme Court.
>
> . . .
>
> (b) The Supreme Court of Idaho shall consider the punishment as well as any errors enumerated by the way of appeal.
>
> (c) With regard to the sentence the court shall determine:
>
> (1) *Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor,* and
>
> (2) *Whether the evidence supports the judge's finding of a statutory aggravating circumstance* from among those enumerated in section 19-2515, Idaho Code, and
>
> (3) *Whether the sentence of death is excessive or disproportionate* to the penalty imposed in similar cases, considering both the crime and the defendant.

(d) Both the defendant and the state shall have the right to submit briefs within time provided by the court, and to present oral argument to the court.

(e) *The court shall include in its decision a reference to those similar cases which it took into consideration.* In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel.

(f) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration.

(g) The Supreme Court shall collect and preserve the records of all cases in which the penalty of death was imposed from and including the year 1975.

Idaho Code § 19-2827 (emphasis added).

The Idaho Supreme Court applied § 19-2827 to Creech, saying:

> We hold that none of these recent Idaho murder decisions militates toward the granting of leniency in the present case. We find no instance in which a defendant found guilty of such previous crimes as those of Thomas Creech has been found deserving of a sentence less than death. We have examined [thirty-four] cases dating back more than 50 years and our examination fails to disclose that any such remorseless, calculating, cold-blooded multiple murderer has (with the exception of Creech I *[State v. Creech*, 589 P.2d 114 (1979)] ever been before this Court. . . . We hold that the death penalty imposed in this case is both proportionate and just.

Creech, 670 P.2d at 476.

Creech had the death sentence imposed upon him by a judge not a jury.[3] *Creech*, 670 P.2d at 466 ("[f]ollowing the conclusion of the sentencing hearing, the district court made its written findings and pronounced sentence of death upon Creech"). In *Walton*, the United States Supreme Court held that "[w]hen a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process . . . [but t]rial judges are presumed to know the law and apply it in making their decisions." *Walton*, 110 S. Ct. at 3057. In the instant case, as recognized by footnote 12 of the panel's opinion, the sentencing judge is thus presumed to have applied the judicial refinements provided to him by *Osborn*.

Did the Idaho Supreme Court have *Osborn* in mind while it processed the case against Creech? The answer is yes. Justice Shepard, who wrote *Creech*, was on the *Osborn* panel. Moreover, the Idaho Supreme Court in *Creech* referred to *Osborn* and quoted *in haec verba* the limiting

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[3] Just as in *Walton*, this case is also distinguishable from *Maynard* because *Maynard* 'the defendant was sentenced by a jury and the jury either was instructed only in the bare terms of the relevant statute or in terms nearly as vague.' *Walton*, 110 S. Ct. at 3057.

passage from *Osborn* that I quote earlier in this opinion. *See id.*, at 471. Thus, the Idaho Supreme Court had in mind the *Osborn* standard when it said, "We now turn to whether the sentencing judge complied with those statutory provisions. . . . We have reviewed the record and hold that the evidence at the sentencing hearing clearly supports the trial court's findings of aggravating and mitigating circumstances." 670 P.2d 470.

Since 1972 in *Furman v. Georgia*, 408 U.S. 238 (1972), the Supreme Court has established certain minimum but strict requirements for states choosing to pursue capital punishment. Idaho has rigorously tailored its laws to meet these requirements. In my view, our court has strayed from the course charted by the Supreme Court in *Walton* and effectively established a standard for Idaho more exacting than the one established for Arizona. Hence, I DISSENT.

(2)

Supreme Court, U.S.
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No. 91-1160

In The

Supreme Court of the United States

October Term, 1991

A. J. ARAVE,

Petitioner,

vs.

THOMAS EUGENE CREECH,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

On May 13, 1981, Thomas Creech and David Jensen were inmates in the maximum security unit at the Idaho Correctional Facility. At 2:00 that afternoon, Jensen attacked Mr. Creech by swinging a sock full of batteries at him. (RT 1984 at 15-20, 26-27.)[1] Mr. Creech defended himself, punching Jensen and taking the batteries away from him. Fifteen minutes later, Jensen once again attacked Mr. Creech, this time slashing him with a razor blade attached to a toothbrush. He slashed Mr. Creech in the stomach, the arms and the face. Mr. Creech swung the sock of batteries at Jensen, hitting him in the head until he collapsed and died. (RT 1984 at 26-33.) Before being taken to the hospital in a wheelchair, and immediately after the fight, Mr. Creech referred medical aid to Jensen. (RT 1984 at 34; ER 156-157.)

On June 8, 1981, Mr. Creech was charged with first degree murder. Although he initially pled not guilty, he later changed his plea to guilty and asked to be sentenced to death. (RT 1981 at 35.) Over his counsel's objection, the trial court allowed Mr. Creech to plead guilty. (RT 1981 at 39-40.) After a January 11, 1982 sentencing hearing the state trial court issued findings of fact. The trial court explicitly found that Jensen had attacked Mr. Creech

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[1] "RT 1981" refers to the Reporter's Transcript covering the August 1981 change of plea hearing. "RT 1982" refers to the Reporter's Transcript covering the January 1982 sentencing hearing. "RT 1984" refers to the Reporter's Transcript covering Mr. Creech's February 1984 motion to withdraw the guilty plea. "ER" refers to the Excerpt of Record filed in this case.

without provocation and that Mr. Creech was initially justified in defending himself:

> "[T]he defendant did not instigate the fight with the victim, but the victim, without provocation, attacked him. [Defendant] was initially justified in protecting himself." (ER 46.)

The state trial court also found, however, that Mr. Creech's actions went "well beyond self-defense" and evidenced an "excessive violent rage." (ER 46.) The trial court imposed a death sentence. (ER 45-50.) In violation of state law, Mr. Creech was not present when the trial court imposed this sentence. Idaho Code § 19-2503.

The case was automatically appealed to the Idaho Supreme Court. On February 25, 1983, after Mr. Creech had been on death row for over one year, the Idaho Supreme Court vacated the death sentence and remanded the case for resentencing because Mr. Creech had not been present at the original sentencing. (ER 51-52.) The case was remanded for the trial court to select and impose a "just and appropriate" sentence. (ER 52.)

On March 15, 1983, the trial court ordered that Mr. Creech and his counsel appear two days later for resentencing. (ER 122.) The trial court denied Mr. Creech's motion for a continuance. (RT 1983 at 22-23.)

At the March 17 resentencing, and in an effort to persuade the court to impose a life sentence, Mr. Creech sought to present a significant amount of mitigating evidence, including testimony from prison guards about his good behavior in prison. Although it had been over 14 months since the original sentencing hearing, the trial

court refused to allow Mr. Creech to present *any* mitigating evidence. Instead, the court simply reread its January 25, 1983 death sentence.

After being denied relief in the state courts, Mr. Creech filed a habeas corpus petition in federal district court. The federal district court denied the petition. Mr. Creech appealed to the Ninth Circuit.

On October 16, 1991, a panel of the Ninth Circuit consisting of Judges Hall, Wiggins and Beezer affirmed the district court's denial in part, reversed it in part and remanded the case for a sentencing hearing at which the trial court would not completely preclude Mr. Creech from presenting mitigating evidence. *Creech v. Arave*, 947 F.2d 873, 881-882 (9th Cir. 1991). Because a remand for resentencing was required, and because the record suggested the trial court relied on two aggravating circumstances without making certain required factual findings, the panel went on to require such factual findings at the resentencing. *Id.* at 882. Finally, the court held that Idaho's "utter disregard" aggravating factor was unconstitutionally vague. *Id.* at 882-885.

Petitioner's Petition for Rehearing and Suggestion for rehearing *En Banc* was rejected, with three of the twenty-six active Circuit Judges dissenting. Petitioner then applied for a stay of mandate from this Court. Justice O'Connor denied this application on December 10, 1991. Petitioner now seeks a Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I.

THE CIRCUIT CORRECTLY HELD THAT IDAHO'S "UTTER DISREGARD" AGGRAVATING FACTOR FAILED TO PROVIDE THE TYPE OF GUIDANCE WHICH WOULD PROPERLY CHANNEL THE SENTENCER'S DISCRETION IN IMPOSING DEATH.

Idaho Code § 19-2515(g)(6) provides that anyone convicted of murder is eligible for the death penalty if he exhibits "utter disregard for human life." In *State v. Osborn*, 102 Idaho 405, 632 P.2d 187 (1981), the Idaho Supreme Court conceded that this phrase was unconstitutionally vague, but attempted to legitimize it by defining it as "reflective of acts or circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer." 631 P.2d at 200-201. Presumably armed with this "limiting" definition, the state trial court sentenced Mr. Creech to die, in part, by relying on the utter disregard aggravating circumstance.

Writing for the panel, and relying entirely on decisions from this Court, Judge Hall held that the definition set forth in *Osborn* was unconstitutionally vague because it failed to narrow the sentencer's discretion as to how it was to apply the utter disregard aggravating factor. *Creech v. Arave, supra*, 947 F.2d at 882-885. Petitioner contends that certiorari is appropriate in this case and that the panel should have acceded to the definition fashioned by the Idaho Supreme Court.

Certiorari is not appropriate in this case for two reasons. First, Judge Hall's decision on this issue is of

limited significance. Of the 37 states with capital punishment, Idaho is the only state with an "utter disregard" aggravating factor. Moreover, Idaho has a separate aggravating factor, unaffected by the decision in this case, which allows imposition of a death sentence for murders that are "heinous, atrocious or cruel, manifesting exceptional depravity."

Second, certiorari is not appropriate in this case because the decision represents a simple and correct application of principles articulated in a long line of decisions from this Court. Judge Hall's application of these principles did not create a split in the courts nor any new law. Moreover, on the facts of this case, application of the *Osborn* construction is totally unsupported by the record.

As the panel noted, this Court has repeatedly held an aggravating circumstance must furnish the sentencer with " 'clear and objective standards' that provide 'specific and detailed guidance,' and 'that make rationally reviewable the process for imposing a sentence of death.' " *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980). *Accord Maynard v. Cartwright*, 486 U.S. 356, 362-364 (1988); *Lewis v. Jeffers*, ___ U.S. ___, 110 S.Ct. 3092, 3099 (1990). The purpose of requiring specific and detailed guidance is to "channel and limit the sentencer's discretion." *Maynard v. Cartwright, supra*, 486 U.S. at 362.

Based on these precise principles, this Court has repeatedly required that a state court may save a facially invalid aggravating circumstance construction if the court narrows and defines the aggravating circumstance by some reference to objective and clear guidelines. *See Shell*

v. Mississippi, ___ U.S. ___, 111 S.Ct. 313 (1990) (invalidating Mississippi's "especially heinous and atrocious" aggravating circumstance when not meaningfully narrowed by reference to some objective or verifiable circumstances); *Walton v. Arizona*, ___ U.S. ___, 110 S.Ct. 3047, 3057-3058 (1990) (upholding Arizona court's narrowing of facially invalid "especially heinous, cruel or depraved" aggravating circumstance when meaningfully narrowed by reference to objective or verifiable circumstances such as infliction of mental anguish or physical abuse, relishing the murder or showing indifference to the victim's suffering).[2]

The circuits have followed this Court's instructions by holding unconstitutional attempts by state courts to define a facially vague aggravating circumstance by reference to an equally vague definition that is without clear and objective guidance to the sentencing court. *See, e.g., Moore v. Clarke*, 904 F.2d 1226, 1229-1233 (8th Cir. 1990) (invalidating Nebraska's "especially heinous, atrocious or cruel" aggravating circumstance when not meaningfully

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[2] *See also Proffitt v. Florida*, 428 U.S. 242, 255-256 (1976) (upholding Florida court's narrowing of "heinous, atrocious or cruel" aggravating circumstance when meaningfully narrowed by reference to objective or verifiable circumstances such as torture); *Godfrey v. Georgia, supra*, 446 U.S. at 430-431 (upholding Georgia court's narrowing of aggravating circumstance when meaningfully narrowed by reference to objective or verifiable circumstances such as torture, aggravated battery or serious physical abuse). *See Maynard v. Cartwright, supra*, 486 U.S. at 364-365 (in rejecting Oklahoma's facially invalid "especially heinous, atrocious or cruel," Court expresses approval of a limiting construction requiring "some kind of torture or physical abuse.").

narrowed by reference to some objective or verifiable circumstances); *Cartwright v. Maynard*, 822 F.2d 1477, 1491 (10th Cir. 1987) (invalidating Oklahoma's "heinous, atrocious and cruel" aggravating factor when not meaningfully narrowed by reference to some objective or verifiable circumstances), aff'd, 486 U.S. 356 (1988).

State courts have also long followed this Court's guidance, properly narrowing facially vague aggravating factors by reference to some objective circumstances. *See, e.g., State v. Wood*, 648 P.2d 71, 85-86 (Utah 1982), *cert. denied* 459 U.S. 988 (1982) (narrowing "ruthlessness" aggravating circumstance to require aggravated battery or torture); *State v. Sonier*, 402 So.2d 650, 659 (La. 1981), *cert. denied* 463 U.S. 1229 (1983) (narrowing "heinous, atrocious and cruel" aggravating circumstance to require serious physical abuse); *State v. Goodman*, 298 N.C. 1, 24-25, 257 S.E.2d 569 (1979) (narrowing "heinous, atrocious and cruel" aggravating circumstance to require torture).

Judge Hall followed these authorities precisely. The first part of *Osborn*'s limiting definition – requiring "the highest, utmost, callous disregard for human life" – is insufficient because it simply restates the language of the statute. This restatement provides no more guidance than the language of the statute itself, and gives the sentencer unbridled discretion to impose a death sentence. "[V]ague terms do not suddenly become clear when they are defined by reference to other vague terms." *Cartwright v. Maynard, supra*, 822 F.2d at 1489.

Nor does the second part of the *Osborn* reformulation – the terms "cold-blooded" or "pitiless" – add the

required clarity to *Osborn*'s construction. As the panel correctly held, these phrases fail to provide any substantive guidance to the sentencer as to the circumstances under which the defendant has exhibited "utter disregard for human life" and those under which he has not. Is the sentencer's discretion meaningfully narrowed when it is allowed to sentence someone to die for being "cold-blooded"?[3]

The term "pitiless" is equally vague. What does "pitiless" mean, and by what objective criteria can a sentencer distinguish a pitiless killing from one that is with pity? As one state supreme court has noted in this exact context, a "pitiless first degree murder assumes the existence of such murder performed with . . . pity. We cannot fathom what it could be." *People v. Superior Court (Engert)*, 31 Cal.3d 797, 803 (1982).

Indeed, on this record, the trial court's finding of "utter disregard" – if intended to mean either "cold blooded" or "pitiless" – is inconceivable.[4] The state trial court found that without any provocation, Jensen instigated the fight with Mr. Creech, Mr. Creech was justified in protecting himself, and that Mr. Creech was acting in

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[3] Although the term "cold-blooded" is itself facially vague, a state may constitutionally narrow such a term by reference to objective criteria. *See Cannady v. State*, 427 So.2d 723 (Fla. 1983) (limiting "cold, calculated and premeditated" aggravating factor to executions or contract murder).

[4] The trial court never stated it was applying the *Osborn* formulation. This may explain why there are no findings that, in fact, the killing was either "cold-blooded" or "pitiless." Nor did the Idaho Supreme Court make any such findings. *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983).

an "excessive violent rage." Jensen attacked Mr. Creech with a sock full of batteries and, moments later, with a razor blade attached to a toothbrush. Jensen cut Mr. Creech's arms, face and stomach. Nevertheless, before being taken to the hospital in a wheelchair, and immediately after the fight, Mr. Creech referred medical aid to Jensen. How can a killing be either "cold blooded" or "pitiless" when it is the result of an excessive violent rage, caused by an unprovoked, deadly attack by the victim, immediately after which the defendant refers medical aid to the victim? It cannot.

Alternatively, respondent argues that the Idaho courts have adequately narrowed the "utter disregard" aggravating circumstance by holding that it does *not* apply in cases where other aggravating circumstances apply. Similarly, but without citation to any authority, respondent argues that the utter disregard circumstance has been properly narrowed because it does *not* apply to killings that are "the product of significant emotional distress or provocation."

Neither of these "negative" definitions solve the fundamental vagueness problem at issue in this case. A facially invalid aggravating factor is rendered constitutional by a limiting definition explaining when the factor *does* apply. Neither precedent, policy nor common sense support respondent's notion that a state can constitutionally define an aggravating factor by explaining when it does *not* apply.

In short, the panel simply applied principles long articulated by this Court to a meaningless definition manufactured by the Idaho Supreme Court. There is no

reason to review the panel's proper application of these principles.

II.

THE CIRCUIT CORRECTLY HELD THAT THE STATE TRIAL COURT'S FAILURE TO APPLY THE BURDEN OF PROOF REQUIRED UNDER STATE LAW BEFORE AGGRAVATING CIRCUMSTANCES MAY BE FOUND TO EXIST RENDERED RELIANCE ON THESE AGGRAVATING FACTORS CONSTITUTIONALLY IMPROPER.

Idaho Code §§ 18-4003(c) and (e) respectively provide that any murder committed by a person who is under sentence for murder, or any murder of an inmate in a prison, constitutes first degree murder. Idaho law is equally clear that such crimes may constitute statutory aggravating circumstances which authorize imposition of a death sentence *only* when accompanied by a specific intent to kill proven beyond a reasonable doubt. Idaho Code §§ 19-2515(g)(1), 19-2515(g)(7).

In imposing a death sentence here, the trial court made no finding of intent and inexplicably purported to rely on Idaho Code §§ 18-4003(c) and (e) as statutory aggravating circumstances. At no point has petitioner ever disputed that if the state trial court did not make the requisite finding of intent, reliance on the aggravating circumstances set forth in § 19-2515(g)(7) was constitutionally improper. *See Clark v. Louisiana State Penitentiary*, 694 F.2d 75, *opinion on rehearing*, 697 F.2d 699 (5th Cir. 1983). Instead, petitioner simply argues that on the particular facts of this case, Judge Hall erred in concluding that

the state trial court failed to make this intent finding beyond a reasonable doubt.

In three separate respects, however, the record shows that no such finding was ever made. First, the state trial court failed to indicate that it had found an intent to kill beyond a reasonable doubt. Its written findings were divided into three sections: (1) aggravating facts found beyond a reasonable doubt; (2) aggravating facts *not* found beyond a reasonable doubt; and (3) mitigating facts. The *only* section of findings which the court purported to make beyond a reasonable doubt was *devoid of any finding that Mr. Creech specifically intended to kill Jensen.* Similarly absent from this section of the findings is any reference to § 19-2515(g)(7).

Second, the state trial court made factual findings about Mr. Creech's state of mind which were inconsistent with an intent to kill. The court explicitly found that Jensen instigated the fight, and that Mr. Creech's actions "evidenced an excessive violent rage," suggesting that it was not a specific-intent crime at all, but one borne of emotional response and passion.

Third, the Idaho Supreme Court itself found that the trial court had *not* made the requisite intent finding necessary for a statutory aggravating circumstance under § 19-2515(g)(7). The only reference to intent in the state trial court's findings was its observation that the murder "*appears* to have been an intentional, calculated act." (Emphasis added.) The Idaho Supreme Court has acknowledged, however, that given its placement in the section of the trial court's findings that did not purport to be made beyond a reasonable doubt, this finding was

unlikely to have been made beyond a reasonable doubt. *See State v. Creech, supra,* 670 P.2d at 470.[5]

Petitioner argues for the first time in its Petition for Writ of Certiorari that Judge Hall was obligated to ignore the state supreme court's finding, "presume" that the trial court *implicitly* found beyond a reasonable doubt that Mr. Creech had the specific intent to kill and accord this implicit factual finding a presumption of correctness under 28 U.S.C. § 2254(d). Certiorari is inappropriate on this issue for three reasons.

First, since this case must be remanded for resentencing due to the trial court's inexplicable refusal to allow presentation of *any* mitigating evidence at Mr. Creech's capital sentencing hearing, the panel's caution that the state judge not apply § 19-2515(g)(7) at resentencing "without making a finding of intent" was a prudent use of judicial resources.[6] In light of the need for a new sentencing hearing, it would have been utterly senseless

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[5] It was for this reason that the Idaho Supreme Court construed this finding as a *non*-statutory aggravating circumstance. *State v. Creech, supra,* 670 P.2d at 470. Had the intent finding been made beyond a reasonable doubt, of course, this would have constituted a statutory aggravating circumstance under § 19-2515(g)(7).

[6] Contrary to petitioner's repeated observations, Judge Hall did *not* require the trial court to make the finding in "a particular format." Indeed, the opinion does not even require the finding to be written. In light of the ambiguous record, Judge Hall's opinion simply and properly advised the trial court that before it could once again rely on § 19-2515(g)(7), it had to make the requisite finding of intent.

to have the state trial court create the same type of ambiguous record, leading to further litigation.

Second, petitioner's argument must be rejected because there were no "implicit" factual findings to which the presumption of correctness could attach. Petitioner correctly notes that the presumption of correctness created by 28 U.S.C. 2254(d) applies to both express and implied factual findings. *Townsend v. Sain,* 372 U.S. 293, 314 (1963). Where no express findings have been made, the federal court may "reconstruct the findings of the state trier of fact, either because his view of the facts is plain from his opinion or because of other indicia." *Id.* Where no express findings have been made, and where the trier of fact is a judge, it may be appropriate to reconstruct the judge's findings by applying the rule that "[t]rial judges are presumed to know the law and to apply it in making their decisions." *Walton v. Arizona, supra,* 110 S.Ct. at 3057.

Contrary to petitioner's suggestion, however, the presumption that trial judges know and apply the law is not irrebuttable. To the contrary, where the state trial court does not articulate its findings, but where the record affirmatively contains indicia of unreliability concerning these factfindings, this presumption may not be employed to infer an implicit factual finding on the state trial court's part. *Townsend v. Sain, supra,* 372 U.S. at 315 and n.10; *Green v. Zant,* 715 F.2d 551, 557-559 (11th Cir. 1983), *cert. denied* 469 U.S. 1143 (1985). *See Clemons v. Mississippi,* ___ U.S. ___, 110 S.Ct. 1441, 1449-1450 (1990) (conflicting indicia in state supreme court opinion regarding the standard of prejudice applied requires a remand); *Eddings v. Oklahoma,* 455 U.S. 104, 109, n.4

(1982). Moreover, as recognized by the Eleventh Circuit in determining whether this general rule justified implied factual findings, "the question of whether factfindings were actually made by the state court is a threshold inquiry. This inquiry must occur prior to any discussion of the presumption of correctness given to factual determinations made by state courts . . . . " *Green v. Zant, supra,* 715 F.2d at 557.

Thus, while it may be appropriate in some circumstances to imply factual findings based on the rule that trial judges know and apply the law, this rule cannot apply when there are affirmative indicia of unreliability concerning the factfindings. In such a situation, there are no implied factual findings to which the presumption of correctness set forth in 28 U.S.C. § 2254(d) can apply.

This is precisely the approach adopted by the Circuit in this case.[7] The trial court did not merely fail to articulate the standard (i.e., beyond a reasonable doubt) by which it was to determine Mr. Creech's state of mind or "specific intent." As observed by the Idaho Supreme Court and Judge Hall, the findings affirmatively reflect, by their very structure, that the trial court's "intent" finding was made under a standard *other* than beyond a reasonable doubt. Moreover, this limited, defective intent finding is rendered even more unreliable by the court's corresponding holding that Jensen's death was the result of Jensen's "instigation" and Creech's "excessive . . . rage." In refusing to presume that the trial court made

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[7] Significantly, Judge Hall's opinion makes clear that she was aware of the presumption of correctness. 947 F.2d at 879, n.5.

factual findings which the record affirmatively suggests the trial court did *not* make, Judge Hall committed no error.

Finally, petitioner's newly-asserted reliance on a presumption of correctness also ignores the established principle that appellate findings are also entitled to a presumption of correctness. *Parker v. Dugger,* ___ U.S. ___, 111 S.Ct. 731, 739 (1991). The panel had no power to substitute its view of the facts for the apparent view of the Idaho Supreme Court that the intent finding had not been made beyond a reasonable doubt. *Wainwright v. Goode,* 464 U.S. 78, 85 (1983).

Respondent does not explain how the presumption of correctness can have meaningful application where the record contains inconsistent findings. Should the panel in this case have presumed as correct the Idaho Supreme Court's finding that the trial court did *not* find intent beyond a reasonable doubt? Or should it have ignored this finding and presumed correct the trial court's findings that Jensen's death resulted from "Jensen's instigation" and Mr. Creech's "excessive rage" (thereby indicating that specific intent was wholly lacking)? Or should the panel have presumed correct the trial court's observation that the killing "appeared" to be an "intentional" act? Both of the latter two findings were given equal weight by the trial court, and neither finding was made "beyond a reasonable doubt": in all events, the trial court could not have made *both* findings beyond a reasonable doubt. Under these circumstances, there can be no presumption of correctness, since it is entirely unclear

what factual finding was made or should be presumed correct.[8]

III.

THE CIRCUIT CORRECTLY HELD THAT BECAUSE THE STATE TRIAL JUDGE WAS CHOOSING BETWEEN LIFE AND DEATH AT THE MARCH 17, 1983 SENTENCING HEARING, THE TRIAL JUDGE'S REFUSAL TO ADMIT ANY MITIGATING EVIDENCE VIOLATED THE EIGHTH AMENDMENT.

In its February 25, 1983 order requiring resentencing, the Idaho Supreme Court made clear that at the resentencing, the trial judge could impose either a life or death sentence:

> "[T]he sentence of death imposed upon the defendant in the absence of defendant and his counsel . . . is vacated and the cause is remanded . . . [for imposition of] such sentence upon the defendant Thomas Eugene Creech as to the said District Judge may appear to be just and appropriate. In the event that said judge shall impose a sentence of death, a warrant therefor shall issue in accord with I.C. section 19-2795 . . . . " (ER 51-52.)

[8] Petitioner has never raised the presumption of correctness issue, either in the federal district court or in the Court of Appeals. Where issues are not raised in the Court of Appeals, this Court will not consider them absent exceptional circumstances. *See, e.g., Adickes v. Kress & Co.*, 398 U.S. 144, 147, n.2 (1970); *Lawn v. United States*, 355 U.S. 339, 362-363, n.16 (1958). *See also Burden v. Zant*, ___ U.S. ___, 111 S.Ct. 862, 865 (1991) (suggesting that reliance on a presumption of correctness may be waived by failure to properly raise the issue in the Court of Appeals). This case does not contain any exceptional circumstances that would justify petitioner's tactical decision to sandbag the panel by holding this argument in reserve in the event of an unfavorable ruling.

In *Sivak v. State*, 112 Idaho 197, 731 P.2d 192 (1986) the Idaho Supreme Court held that as a matter of state law, a remand order for resentencing in the defendant's presence empowered the trial court to choose between life and death. *Sivak* involved facts identical to this case: defendant was convicted of murder, sentenced to death in his absence, and the Idaho Supreme Court issued an order vacating the death sentence which was *word-for-word* identical to the remand order in this case. On appeal from the subsequent death sentence, the Idaho Supreme Court explicitly held that its remand order gave the trial judge authority to choose between life and death:

> "Initially, we must point out that our intent in vacating Sivak's sentence in our order of March 24, 1983, was not merely to require that the defendant and his counsel be physically present while the court recited its findings and conclusions made over a year before. Inherent in the order that the district judge 'impose such sentence upon the defendant Lacey M. Sivak as may appear to be just and appropriate,' was the obligation of the judge not to ignore any relevant motions or arguments made by the defendant or his counsel which would affect the justness and appropriateness of the sentence." 731 P.2d at 195.

Pursuant to Idaho state law, the Idaho Supreme Court's *identical* remand order in this case gave the trial court authority to decide between sentencing Mr. Creech to live or sentencing him to die. Under this circumstance,

the trial court's complete refusal to allow Mr. Creech to present *any* mitigating evidence was a plain violation of the Eighth Amendment.

When a state provides for a sentencing hearing at which the sentencer chooses between life and death, the Eighth Amendment does not allow the state to preclude the defendant from presenting relevant mitigating evidence at this hearing. *Lockett v. Ohio*, 438 U.S. 586 (1978). Such evidence may include, for example, mitigating evidence of a defendant's good behavior in prison. *Skipper v. South Carolina*, 476 U.S. 1 (1986).

Every court to ever face this issue has held that when state law provides for a resentencing at which the sentencer may choose between life and death, the Eighth Amendment requires that the defendant be allowed to present *current* evidence in mitigation. *See, e.g., Songer v. Wainwright*, 769 F.2d 1488, 1489 (11th Cir. 1985) (ordering resentencing at which "any and all evidence in mitigation" could be introduced); *State v. Tison*, 160 Ariz. 501, 774 P.2d 805 (1989) (Arizona Supreme Court holds that at a capital resentencing hearing the defendant was entitled to present current evidence in mitigation); *Pickens v. State*, 730 S.W.2d 230, 232-233 (Ark. 1987) (at a resentencing hearing the trial court refused to allow defendant to present current evidence in mitigation: held, this refusal violated the Eighth Amendment); *Sivak v. State, supra*, 731 P.2d at 197-198 (same); *State v. Watson*, 129 Ariz. 60, 628

P.2d 943 (1981) (same).[9] In this case, Judge Hall correctly applied these well established principles and held that the trial court's refusal to admit any mitigating evidence at the March 17, 1983 resentencing violated the Eighth Amendment principles recognized in *Lockett* and *Skipper*. *Creech v. Arave, supra*, 947 F.2d at 881-882.

Contrary to the misleading suggestion in petitioner's Petition for Writ of Certiorari, neither the Idaho Supreme Court nor the Circuit Court of Appeals held that the March 17, 1983 sentencing hearing was somehow required by the Eighth Amendment. The Idaho Supreme Court held that state law gave the trial court discretion to choose between life and death. In turn, Judge Hall simply agreed with every other court to ever face this issue, holding that where *state law itself* provides for a sentencing hearing at which the sentencer may choose between life and death, the Eighth Amendment requires that the defendant be allowed to present evidence and argue for life. *Compare Parker v. Dugger, supra*, 111 S.Ct. 731 (although neither appellate reweighing of aggravating circumstances nor harmless error analysis are constitutionally required, if either process is performed, it must comport with the Eighth Amendment); *Clemons v. Mississippi, supra*, 110 S.Ct. 1441 (same); *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (although procedure allowing a judge to override a jury's sentencing recommendation in a capital

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[9] In *Skipper v. South Carolina, supra*, this Court noted that if the state chose to seek the death penalty at a resentencing, defendant was entitled to a hearing at which he could "present any and all relevant mitigating evidence that is available." 476 U.S. at 4.

case is not constitutionally compelled, if such a procedure is authorized, it must comport with the Eighth Amendment). There is utterly no reason to disturb the Circuit's straightforward application of these Eighth Amendment principles.

CONCLUSION

The Circuit's decision that Idaho had failed to adequately limit the application of its unique "utter disregard" aggravating circumstance follows inexorably from principles of law long established by this Court. Similarly, the panel's two alternative grounds for its partial reversal faithfully applied this Court's precedents to the unique facts of this case, facts which are unlikely to recur in Idaho or elsewhere. There is nothing in the panel's decision which warrants this Court's review.

Respectfully submitted,

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(3)

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No. 91-1160

In The

Supreme Court of the United States

October Term, 1991

A. J. ARAVE, WARDEN,

Petitioner, Cross-Respondent,

v.

THOMAS E. CREECH,

Respondent, Cross-Petitioner.

Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Facts relevant to Creech's Cross-Petition for a Writ of Certiorari are reviewed in the warden's petition for a Writ of Certiorari and need not be repeated here.

REASONS FOR DENYING THE WRIT

Creech's Cross-Petition for a Writ of Certiorari is concerned with the circumstance that Creech, acting against his lawyer's advice and over his lawyer's specific objection to the court, insisted on entering a guilty plea, about which he was extensively examined by the court before the plea was accepted. Although Creech contends that issues of voluntariness are raised by the court of appeals' refusal to hold that it was error to deny Creech the right to withdraw his plea, this case is not an appropriate one for the development of rules related to voluntariness of pleas. Creech chose between the right to allow counsel to conduct his case and the right to conduct his case himself. His later assertions that it was disadvantageous to do so have little to do with voluntariness.

I.

CERTIORARI SHOULD BE DENIED WITH RESPECT TO CREECH'S CLAIM THAT HE ENTERED AN INVOLUNTARY GUILTY PLEA

Creech's assertion that the court of appeals erred by determining that his "uncounseled, involuntary guilty plea" was harmless error raises no important federal

question that should be considered by this court, principally because Creech's contentions are factually and legally incorrect.

Creech argued to the court of appeals that he should have been permitted to withdraw his guilty plea because he was not made aware of what he has called the defense of "imperfect self-defense," and that because he did not have this information his plea was not voluntary and intelligent. *Creech v. Arave*, 947 F.2d 873 (9th Cir. 1991). The court of appeals, concluding that these arguments differed in form but not in substance, held that Creech had not been ineffectively represented, then went on to state that even if one were to assume that "his attorney's performance was not reasonable, . . . Creech's ignorance of the possible defense of 'imperfect self-defense' was harmless beyond a reasonable doubt." (Appendix, p. 18.)

In fact, as the court of appeals recognized, "any omission on [the part of Creech's attorney] was not the result of his incompetence as counsel. Creech simply did not allow his counsel to inform him of the elements of the offense or possible defenses." (*Creech v. Arave*, Appendix, p. 12.)

Creech's guilty plea resulted from a personal decision made over the objection of counsel. The record reflects that on August 28, 1981, the state district court convened a hearing to take up a demand by Creech, presented by letter to the court, that he be allowed to enter a plea of guilty to the charge of first degree murder. Creech's counsel stated to the court that such a course of action was contrary to his advice. He sought a continuance to research the issue, which was opposed by the

prosecutor on the ground that, "there has never been a representation made to the court or to me that Mr. Creech is not fully competent to make his own decision within the realm of the law." Creech took the stand and insisted that he be permitted to plead guilty, irrespective of his counsel's advice. His attorney then moved to withdraw from the case. The motion was denied because the court believed that Creech should have the assistance of counsel to "inform him under the law of what's going on."

Creech's attorney, Rolf Kehne, stated to the court that Creech had been seen by a psychologist for evaluation, and that the evaluations were not completed. He advised the court that, "We would like to reserve the right to come back to the court and withdraw the plea if it turns out that Mr. Creech is in some way not competent to make this decision." The state had no objection.

The prosecutor made a representation respecting the facts he intended to prove and stated that he would seek the death penalty.

Creech was then examined by the court respecting his plea. He testified under oath that he desired to plead guilty to the offense of first degree murder, understanding that the death penalty was possible. He also testified that he had received no promises of leniency; that he had not been coerced; that he had no reason to believe that the death penalty would not be imposed; that he had not been threatened in order to coerce his plea; that he understood that the court was not bound by any recommendations respecting punishment that any party might make; that he understood that a sentencing hearing would be

conducted; that his prior criminal record would be considered at sentencing; that the confessions he made to police officers did not induce his plea; that he was not addicted to the use of drugs nor under the influence of alcohol or drugs; that he had no psychological or mental problems that would have a bearing on this plea; that he was guilty and that such was the reason he was pleading guilty; that his attorney had advised him not to enter a plea of guilty; that he had sufficient time to discuss the matter with his attorney; that he had explained to Mr. Kehne everything he knew about the charge; that Mr. Kehne had advised him to his satisfaction of his rights, defenses and the possible consequences of a plea of guilty; that his plea was the result of his own voluntary decision; that by pleading guilty he was giving up his constitutional rights to a trial by jury, to confront his accusers and to avail himself of the privilege against self-incrimination; that he was "giving up any defense you have to the charge at all;" and that he understood that he would be admitting the truth of the charge by pleading guilty. Creech told the court that he understood that he was giving up any claim that the court had not treated him fairly in the proceedings, and that he was satisfied with the work of his attorney. He was questioned about his understanding of first degree murder, and he responded with an answer suggesting that he believed that he had to have premeditated the offense.

THE COURT: What, as you understand it, does a person have to do to be guilty of the charge of first degree murder? What does it mean to you?

A: He has got to think about doing it.

Q: In killing someone?

A: In killing someone.

Q: Do you understand, sir, that if I accept your plea of guilty, then it's too late to plead not guilty?

A: Yes, sir.

Creech was then asked to tell the court in his own words what he had done, and he answered:

A: I had some problems with a guy named Jensen. And we got into an argument earlier in the day and I fought with him. Then later on that same day we got into it again and I killed him.

Q: I gather you've, from Mr. Harris' statement, apparently did this with a sock with some batteries in it or something like that?

A: Yes sir.

Q: Is that correct?

A: Yes sir.

The prosecuting attorney explored this question further:

MR. HARRIS: Mr. Creech, did you intend to kill Mr. Jensen?

MR. KEHNE: I'll object. It's not within the statute.

THE COURT: Overruled. You may answer.

THE WITNESS: When I first had the fight with him no. But the second time, yes, I did intend to kill him.

Q: That was later in the day?

A: Yes sir.

A: Did you take action to kill him after he was no longer a threat to you? Was in no condition to hurt you?

A: Yes I did.

Q: What did that include? What did you do?

A: I kicked him in his throat and his head.

Q: Was that after he was unconscious?

A: He wasn't all the way unconscious, but he was down on the floor.

Q: Did you hit him with the sock after he had fallen to the floor?

A: I don't remember. The sock busted and the batteries fell out. I'm not sure when that happened.

Q: Did they bust after you hit him with the sock?

A: Yes, sir.

Q: Did you think he was going to die after you left the cell the final time?

A: I thought he would probably.

The evidentiary record of the case made it quite plain, as the court of appeals noted, that Creech could not possibly have prevailed with any kind of justifiable homicide defense, perfect or otherwise. Importantly, the "imperfect self-defense" justification is not part of Idaho law. To the extent that such a defense attempts to substitute a defendant's subjective fears leading to the use of deadly force for an objective assessment of the reasonableness of the defendant's homicidal acts, the

"imperfect self-defense" theory has been rejected by the Idaho Supreme Court. *State v. Johns*, 736 P.2d 1327 (Idaho 1987). It would hardly have been appropriate for the Ninth Circuit Court of Appeals to hold that the state trial court was obliged to insure that Creech was expressly informed of the elements of a nonexistent defense.

Moreover, this case is the wrong choice for considering the question "whether a defendants uncounseled, involuntary guilty plea constitutes harmless error." If Creech were ill informed about the law governing his crime, it was because he *insisted* on entering a plea under such conditions.

In *Faretta v. California*, 422 U.S. 806 (1975), this Court held that the legal destiny of the accused is always, constitutionally, in his own hands and not the hands of his lawyer.

> [W]e confront here the near universal conviction on the part of our people, as well as our courts, that forcing a lawyer on an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so. *Faretta*, 422 U.S. at 817.

The state trial court would have violated the principle quoted above had it gone any further than it did in trying to discourage Creech from refusing his lawyer's advice. The trial judge thoroughly examined Creech about his decision and about his consultations with his attorney. Creech testified under oath, in the manner described previously, that he was fully aware of the nature of the charges against him, his rights, and the possible consequences of a guilty plea.

The role of the trial judge who must respond to a legal judgement the defendant has reserved to himself is limited to insuring that the defendant has been informed of the hazards of the course he has chosen to follow. In *United States v. Harris,* 683 F.2d 322 (9th Cir. 1982), the court of appeals pointed out "that there is a narrow path to be carefully treaded between the *Faretta* right to refuse the assistance of counsel and the assurance that the defendant's refusal of such services is made with full awareness of the risks of doing so." 683 F.2d at 324. An effort by the trial judge to persuade or pressure the defendant to accept his counsel's advice when he does not wish to do so is clearly an infringement on the *Faretta* principle that the defendant is the master of his own case.

A voluntary decision to plead guilty rather than avail oneself of the right to go to trial with the assistance of counsel is not a waiver of counsel, to be tested by considerations of intelligence and knowingness. Instead, it is simply the exercise of one of two different constitutional rights. In *United States v. Curcio,* 694 F.2d 14 (1982), the Court of Appeals for the Second Circuit discussed the difference between a "waiver" and the choice of one constitutional right over another. In *Curcio,* two brothers desired to be jointly represented by the same lawyer, notwithstanding possible problems of conflicts of interest. The trial judge, concerned with the right to conflict-free representation, held that one of the brothers had not made a knowing and intelligent waiver of the right, even though he was "a person of experience" with criminal prosecutions. *Curcio,* 694 F.2d at 26. The defendant was ordered to obtain other counsel.

The Court of Appeals reversed the trial court's order in *Curcio,* holding that the right to one's choice of counsel was not to be mechanically subordinated to the differing right to conflict-free representation. The court viewed the choice between two constitutional rights as simply a choice, not a matter of waiver:

> It seems to us that a case where defendant is vigorously asserting his right to counsel of his choosing is not truly a case of "waiver" at all; it is rather a decision to assert one constitutional right rather than another [citations omitted]. This is more than a semantic quibble; characterizing Curcio's choice as one of "waiver" of the right to conflict-free representation invites judicial scrutiny that is excessively paternalistic and insufficiently protective of the competing right to counsel of choice. 694 F.2d at 22, note 8.

By the same rationale, Creech's present claim that the Court should stand more firmly between him and his decision to plead guilty ignores the basic premise of *Faretta.* This Court could only review the question presented by Creech if it accepts the premise that a voluntariness question necessarily results from a defendant's insistence on ignoring the advice of this attorney.

II.

NO IMPORTANT FEDERAL QUESTION IS PRESENTED BY PETITIONER'S CLAIM THAT THE COURT OF APPEALS ERRED IN HOLDING THAT A CRIMINAL DEFENDANT MAY PLEAD GUILTY TO A CAPITAL CRIME WITHOUT COUNSEL AND WITHOUT BEING ADVISED OF THE DANGERS OF PROCEEDING WITHOUT COUNSEL

Creech has offered a second question for review based on the contention that he pled guilty to a capital offense "without counsel and without being advised of the dangers of proceeding without counsel." Cross-Respondent sees this as simply a different formulation of the question whether Creech's guilty plea should be considered constitutionally deficient because it was entered against the advice of counsel, notwithstanding Creech's personal control over his case. The factual and legal deficiencies of Creech's first claim, discussed above, apply equally to the second question presented.

CONCLUSION

The cross-petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 91-1160

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Supreme Court of the United States

October Term, 1992

A. J. ARAVE, WARDEN,

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v.

THOMAS E. CREECH,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

JOINT APPENDIX

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GENERAL DOCKET FOR
Ninth Circuit Court of Appeals

Filed: 7/21/86

Court of Appeals Docket #: 86 3983
Nsuit: 3530 Habeas corpus (Fed)
Creech v. Arave, et al., ct al
Appeal from: District of Idaho (Boise)

Case type information:
1) civil
2) private
3) habeas corpus

Lower court information:

District: 0976-1: CV-86-1042-HLR
presiding judge: Harold L. Ryan, District Judge
Date Filed: 1/31/86
Date order/judgment: 6/17/86
Date NOA filed: 7/9/86

Fee status: in forma pauperis

Prior cases:
None
Current cases:
None

THOMAS E. CREECH Petitioner - Appellant	Rolf M. Kehne, Esq. (208) 342-2272 [COR LD NTC cja] 1208 W. State Street Boise, ID 83702

Cliff Gardner, Esq.
415/992-9404
Suite 450
[COR LD NTC cja]
FIEDLER, GARDNER & DERHAM
Ghirardelli Square
Cocoa Building
900 North Point
San Francisco, CA 94109

v.

A. J. ARAVE, Warden, Idaho State Penitentiary
Respondent - Appellee

Lynn E. Thomas, Solicitor General
208-334-2400
[COR LD NTC dag]
Idaho Department of Finance
700 West State Street
Statehouse Mail
Boise, ID 83720-3313

Jim Jones, Attorney General
[COR LD NTC ag]
ATTORNEY GENERAL, STATE OF IDAHO
Natural Resources Division
Statehouse, Rm. 210
Boise, ID 83720
(208) 334-2400

Frederick C. Lyon, Clerk
208/334-2210
[NTC]
Supreme Court,
Court of Appeals
Supreme Court Building
451 W. State Street
Boise, ID 83720

AL MURPHY, Director, Idaho State Board of Corrections
Respondent - Appellee

Lynn E. Thomas, Solicitor General
(See above)
[COR LD NTC dag]

Jim Jones, Attorney General
(See above)
[COR LD NTC ag]

JIM JONES, Attorney General, State of Idaho
Respondent - Appellee

Lynne E. Thomas, Solicitor General
(See above)
[COR LD NTC dag]

Jim Jones, Attorney General
(See above)
[COR LD NTC ag]

THOMAS E. CREECH

Petitioner - Appellant

v.

A. J. ARAVE, Warden, Idaho State Penitentiary; AL MURPHY, Director, Idaho State Board of Corrections; JIM JONES, Attorney General, State of Idaho

Respondents - Appellees

7/21/86 DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. Sent appellant(s) civil appeals docketing statement 7/22/86. (jr)

7/21/86 Filed appellant's (Thomas E. Creech) motion for stay of execution to (CRIMATT); served on 7/18/86 [47355] (jr)

7/21/86 Filed appellees' (Jim Jones, Al Murphy and A. J Arave) emergency motion to vacate certificate of probable cause and to deny stay of

execution to (CRIMATT); served on 7/18/86. [47356] [86-3903] (jr)

7/22/86 Received as of 7/21/86 copy of District Court order denying appellees' motion to recall certificate of probable cause to (CRIMATT). (jr)

7/23/86 Received District Court order dtd, 7/16 re: denying motion to recall certificate of probable cause. Also rec'd documents pertaining to emergency motion. (CRIMATT). (jw)

7/24/86 Filed order (FARRIS, PREGERSON, WIGGINS,) aplt's motion for a stay of execution pending appeal is granted. Aplees' motion to vacate the DC's certificate of probable cause is denied. [86-3983] (dmf)

8/13/86 Received Aple atty L. Thomas letter dated 8/7/86 re: Aple was not served a copy of Aplt's mtn for stay. (Clk served copy 8/13/86) (vm)

8/27/86 Received as of 08/04/86, copy of Supreme Court order, denying the application of the Solicitor General of Idaho for an order to vacate the stay of execution of sentence of death entered by the U.S. Court of Appeals for the Ninth Circuit. (CRIMATT) [86-3983] (sm)

11/18/86 Filed as of 11/13/86, Appellee Jim Jones, Appellee Al Murphy, Appellee A. J. Arave's motion to dismiss the case. [86-3983]; served on 11/10/86. [76596] (Crimatt) (vm)

12/2/86 Filed order (FARRIS,) Aplt's counsel will show cause in writing within 14 days hereof why he should not be disciplined for failure to comply with the rules, and why the

appeal should not be dismissed for failure to prosecute. [86-3983] (dmf)

1/8/87 Received as of 12/30/86 Rolf M. Kehne's original response to order to show cause filed 12/2/86 no copies and no service on opposing counsel; counsel notified. [86-3983] (jr)

1/12/87 Filed Appellant Thomas E. Creech's response to order to show cause 1/8/87 (CRIMATT) [86-3983] (dmf)

2/2/87 Received copy of transcript designation and ordering form filed in DC (sent to case file) (sm)

3/9/87 Filed certificate of record on appeal RT filed in DC 03/05/87 appellant's opening brief due 4/20/87 for Thomas E. Creech [86-3983] (sm)

3/9/87 Sent letter to Appellee Jim Jones, Appellee Al Murphy, Appellee A. J. Arave, Appellant Thomas E. Creech setting briefing schedule: setting schedule as follows: appellant's brief, excerpt and designation are due on 4/20/87 for Thomas E. Creech [86-3983] (sm)

3/11/87 Filed order (GOODWIN and SCHROEDER) The motion to dismiss is denied. Rolf M. Kehne, Esq., is reprimanded for his lack of dilligence and admonished that any future failure to comply with the rules of this court may result in dismissal of the appeal and imposition of sanctions. [76596-1] [86-3983] (sm)

3/24/87 FILED, AS OF 3/9/87, CERTIFIED TRANSCRIPT OF RECORD ON APPEAL IN ONE

VOLUME OF REPORTER'S TRANSCRIPTS (ORIGINAL). [86-3983] [86-3983] (jr)

3/24/87 Filed as of 3/20/87 certified copy of district court docket entries in lieu of record pursuant to Rule 11(e). [86-3983] (jr)

4/20/87 Filed Appellant Thomas E. Creech's motion to extend time to file appellant's opening brief (CRIMATT) [86-3983] served on 4/17/87 [122633] (dmf)

4/20/87 Filed Appellant Thomas E. Creech's motion for appointment of co-counsel. (CRIMATT) [86-3983] served on 4/17/87 [122641] (dmf)

5/11/87 Filed order (FARRIS) The briefing schedule established 03/09/87 is vacated. A new briefing schedule will be established upon disposition of appellant's pending motion for appointment of co-counsel. [86-3983] (sm)

6/22/87 Filed order (ANDERSON and CANBY) Petitioner's motion for appointment of co-counsel is granted. See 18 U.S.C. 3005 and 3006A (9a)(2)(B). Cliff Gardner, Esq., will be appointed by separate order. [122641-1] [86-3983] Appellant's opening brief and excerpt of record are due 07/27/87. Appellees' brief and appellant's reply brief, if any, shall be filed in accordance with the time limits set forth in Fed. R. App. P. 31(a). [86-3983] (sm)

6/22/87 Criminal Justice Act voucher sent (voucher #1404016) to Cliff Gardner for Appellant Thomas E. Creech [86-3983] (sm)

7/27/87 Filed Appellant Thomas E. Creech's motion to extend time to file appellant's opening

brief until 10/15/87 (CRIMATT) [86-3983] served on 7/24/87 [169594] (dmf)

8/13/87 Filed order CRIMATT (dpt) Appellant's motion for an extension of time to file the opening brief is agranted. Appellant's opening brief is due 10/15/87. Appellees' brief and appellant's reply brief shall be filed in accordance with the time limits set forth in FRAP 31(a). [169594-1] appellant's opening brief is now due 10/15/87 for Thomas E. Creech. [86-3983] (ah)

10/16/87 Filed as of 10/15/87, Appellant Thomas E. Creech's motion to file oversized brief (CRIMATT) [86-3903]; served on 10/14/87. [208093] (dmf)

10/16/87 Received, as of 10/15/87, Appellant Thomas E. Creech's brief in 15 copies of 94 pages, oversize, motion pending. Served on 10/15/87. [86-3983] (dmf)

11/2/87 Filed order (FARRIS) denying motion to file oversized brief [208093-1] The clerk is ordered to return the opening brief to appeallan, and appellant shall submit an opening brief of no more that 50 pages no later than 11/20/87. Appellees' brief and appellant's reply brief shall be filed in accordance with the time limits set forth in FRAP 31(a). [86-3983] (ah)

11/3/87 Hold brief pending motion for reconsideration. [86-3983] (ah)

11/4/87 Filed Appellant Thomas E. Creech's motion to reconsider order of the Court denying appellant's motion to file an oversized brief [86-3983] served on 11/4/87 [215807] (CRIMATT) (sm)

11/13/87 Filed order (ALARCON, NORRIS) Appellant's motion for reconsideration of the court's order denying leave to file an oversized brief is granted. Appellant's opening brief already received is ordered filed. [215807-1] Appellees' brief and appellant's reply brief shall be filed in accordance with the time limits set forth in FRAP 31(a). [86-3983] (ah)

11/16/87 Filed as of 11/13/87 original and 15 copies Appellant Thomas E. Creech opening brief, 94 pages, and excerpts of record in 1 volumes, served on 10/15/87 [86-3983] (ah)

12/16/87 Filed appellee's Jim Jones, Al Murphy, A. J. Arave motion to file oversized brief (CRIMATT) [86-3983] served on 12/16/87 [335720] (with copy of brief) (dmf)

12/16/87 Filed appellee's Jim Jones, Al Murphy, A. J. Arave motion to extend time to file appellee's brief (CRIMATT) [86-3983] served on 12/16/87 [335744] (dmf)

12/16/87 Received orig. copies 15 Jim Jones, Al Murphy, A. J. Arave's brief of 59 pages; served on 12/15/87 deficient: oversize, motion pending; 6 copies of excerpts. [86-3983] (dmf)

12/31/87 Filed order (FARRIS) Appellee's motion for leave to file an oversized brief and for an extension of time are granted. The brief already received is ordered filed. Appellant's optional reply brief shall be filed in accordance with the time limits set forth in Fed. R. App. P. 31(a). [335720-1] [335744-1] [86-3983] (sm)

12/31/87 Filed original and 15 copies appellee Jim Jones, Al Murphy, A. J. Arave's 59 pages brief, with excerpts of record in 1 volumes, served on 12/15/87, pursuant to order of 12/31/87. [86-3983] (sm)

1/20/88 Received as of 01/13/88, orig. 15 copies Thomas E. Creech's brief of 25 pages; served on 1/13/88 deficient; Late (notified counsel to file motion) [86-3983] response to brief deficiency notice due 2/3/88 for Thomas E. Creech (sm)

1/22/88 Filed as of 1/21/88, Appellant Thomas E. Creech's motion to extend time to file reply brief (CRIMATT w/copy of brief) [86-3983]; served on 1/21/88 [434172] (dmf)

1/25/88 INVENTORIED [86-3983] (mm)

1/29/88 Filed order (ANDERSON) Appellant's motion for an extension of time to file the reply brief is granted. The reply brief already received is order filed. [434172-1] [86-3983] (sm)

1/29/88 Filed original and 15 copies Thomas E. Creech reply brief, 25 pages, served on 1/13/88, pursuant to order of 01/29/88. [86-3983] (sm)

2/9/88 Calendar Check performed [86-3983] (th)

2/16/88 Calendar materials being prepared. [86-3983] [86-3983] (th)

2/18/88 CALENDARED: SEATTLE APR 6, 1988 9:00 a.m. [86-3983] (aw)

3/29/88 Received as of 3/28/88 appellant's (Thomas E. Creech) letter dated 3/28/88 re: additional authorities; served on 3/28/88 to (panel). [86-3983] (jr)

4/4/88 Received Appellee A. J. Arave, et al, letter dated 4/1/88 re: addl. citations. (PANEL) [86-3983] (dmf)

4/5/88 Filed supplement to certified record on appeal (filed 3/24/87) in 2 Volumes 2 Clerk's Rec 0 RT (orig) [86-3983] (dmf)

4/6/88 ARGUED AND SUBMITTED TO: Robert R. Beezer, Cynthia Melcomb HALL, Charles E. WIGGINS [86-3983] (dmf)

4/7/88 Received aplees' letter dated 4/5/88 re: addl. citations. (PANEL) [86-3983] (dmf)

4/12/88 Received CJA voucher (Voucher #1404016) from counsel for approval of claim. [86-3983] (pn)

5/3/88 CJA voucher (Voucher #1404016) forwarded to panel judge for approval. [86-3983] (pn)

5/27/88 CJA voucher (Voucher #1404016) received from panel judge; approved. (pn)

5/27/88 Sent CJA voucher (Voucher #1404016) to Chief Judge for approval of excess. (pn)

5/27/88 Received CJA voucher (Voucher #1404016) from Chief Judge approving excess claim. (pn)

5/31/88 CJA voucher (Voucher #1404016) sent to Administrative Office with supporting documents. (pn)

7/5/88 Received Appellant Thomas E. Creech letter dated 6/30/88 re: addl. citations. (PANEL) [86-3983] (dmf)

8/25/88 Filed order (BEEZER, HALL & WIGGINS) this case is ordered off submission pending the outcome of our en banc decision in Adamson v. Ricketts, No. 84-2069 (on remand from the Supreme Court). [86-3983] (jr)

10/24/88 Received aplt Thomas E. Creech's additional citations (letter), served on 10/21/88 (PANEL) [86-3983] (dmf)

12/29/88 Received Appellant Thomas E. Creech letter dated 12/28/88 re: informing that the case of Adamson vs. Ricketts, no. 84-2069, as decided on 12/22/88. (PANEL) [86-3983] (dmf)

2/13/89 Received from Clerk, State of Idaho Supreme Court of Appeals letter dated 2/7/89 requesting copies of orders/opinions (except orders re: briefing schedules, etc). [86-3983] (jr)

5/4/89 Received Cliff Gardner for Appellant Thomas E. Creech letter dated 5/2/89 re: change of address. (CASEFILE) [86-3983] (mt)

6/8/89 Received Appellees Jim Jones, et al.'s additional citations, served on 6/5/89. (PANEL) [86-3983] (mt)

6/15/89 Received Thomas E. Creech additional citations, served on 6/13/89. (PANEL) [86-3983] (mt)

6/25/90 Rec'd aplt's letter of additional citations; served on 6/21/90 to (panel). [86-3983] (jr)

7/12/90 Filed order (HALL,); This case is resubmitted effective the date this order is filed. [86-3983] (dmf)

7/12/90 Case resubmitted on this date to BEEZER, HALL, WIGGINS. (See previous deferral of submission.) Per order of 7/12/90. [86-3983] (dmf)

8/3/90 Filed order (BEEZER, HALL, WIGGINS): It is ordered that, within 21 days from the date of this order, petitioner-aplt shall file a suppl. brief addressing the effect on this case by the opinion in Walton v. Arizona and Lewis v. Jeffers. In addition, aplt should discuss any other relevant authority published since 4/6/88, the date of oral argument in this matter. Defendant-aplee shall file a responsive brief within 21 days of the date of aplt's brief. [86-3983] (dmf)

8/27/90 Filed original and 15 copies Appellant Thomas E. Creech supplemental brief of 41 pages, served on 8/24/90 (PANEL). [86-3983] (mt)

9/13/90 Filed A. J. ARAVE, et al motion to extend time to file supplemental brief until 10/12/90 (PANEL) [86-3983] served on 9/11/90 [1812540] (dmf)

9/28/90 Filed order (BEEZER,, HALL,, WIGGINS,): Aple's motion for an extension of time to file its brief is granted. The brief shall be filed no later than 10/12/90. No further requests by aples for extension of time to file will be considered. [1812540-1] [86-3983] (rv)

10/12/90 Filed original and 15 copies Appellee Jim Jones, Appellee Al Murphy, Appellee A. J.

Arave supplemental brief of 10 pages, served on 10/12/90 (PANEL) [86-3983] (dmf)

10/18/90 Filed Appellant Thomas E. Creech's motion for leave to file supplemental reply brief. (PANEL) [86-3983] served on 10/17/90 [1827936] [86-3983] (dmf)

10/18/90 Received original and 15 copies Appellant Thomas E. Creech supplemental brief of 5 pages, served on 10/17/90 deficient: motion to file pending: (PANEL w/motion to file) [86-3983] (dmf)

10/25/90 Received Jim Jones, Al Murphy, A. J. Arave additional citations, served on 10/23/90 (PANEL) [86-3983] (dmf)

11/9/90 Received Thomas E. Creech additional citations, served on 11/7/90 (PANEL) [86-3983] (dmf)

12/10/90 Filed original and 15 copies Appellant Thomas E. Creech supplemental brief of 5 pages, served on 10/17/90 previously rec'd. (PANEL) [86-3983] (jlc)

12/11/90 Filed order (BEEZER, HALL, WIGGINS): appellant's application to permit filing of a supplemental reply brief is hereby granted. [86-3983] (jlc)

3/27/91 FILED OPINION: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED (Terminated on the Merits after Oral Hearing; Affirmed (in part) and Reversed (in part); Written, Signed, Published. BEEZER, HALL, author, WIGGINS.) FILED AND ENTERED JUDGMENT. [86-3983] (ck)

4/11/91 [1912597] Filed original and 40 copies Appellee A. J. Arave petition for rehearing with

suggestion for rehearing en banc 14 p. pages, served on 4/10/91. (PANEL & ALL ACTIVE JUDGES) [86-3983] (jlc)

4/11/91 [1912608] Filed original and 40 copies Appellant Thomas E. Creech petition for rehearing with suggestion for rehearing en banc 15 p.pages, served on 4/9/91. (PANEL & ALL ACTIVE JUDGES) [86-3983] (jlc)

10/16/91 Filed order and amended opinion (Judges Robert R. BEEZER, Cynthia H. HALL, Charles E. WIGGINS) the opinion filed on 3/27/91 is hereby amended as follows: (see text). With these amendments the petition for rehearing from the aplt and the petition for rehearing from the aples are denied and both suggestions for rehearing en banc are rejected. (Judge Trott dissenting from the order denying rehearing en banc. Kozinski & T.G. Nelson joining.) [86-3983] (jlc)

10/28/91 Filed aples' motion for stay of mandate; affidavit of Lynn E. Thomas. (10/25) (LEAD JUDGE) [86-3983] (jlc)

11/6/91 Received CJA voucher (voucher #suppl#1404016, recap 23,092.50) from counsel (Gardner) for approval of claim. [86-3983] (pn)

11/19/91 CJA voucher (Voucher # suppl#1404016 toall) forwarded to panel judge for approval. [86-3983] (pn)

12/3/91 CJA voucher (Voucher #1404016) received from panel judge; approved. (mlm)

12/4/91 Filed order (Cynthia H. HALL): respondents' motion for stay of mandate filed 10/28/91, is hereby DENIED. [86-3983] (jlc)

12/4/91 MANDATE ISSUED [86-3983] (jlc)

12/9/91 Sent CJA voucher (Voucher #1404016) to Chief Judge (BBF) for approval of excess. (mlm)

12/19/91 Received supplemental CJA voucher (Voucher #1404016) from Chief Judge approving excess claim. (mt)

1/21/92 Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 91-1160 filed on 1/14/92. [86-3983] (jlc)

1/24/92 Processed CJA voucher (Voucher #1404016 sup. for $23092.50) for counsel-(Cliff Gardner) [86-3983] (mlm)

2/27/92 Received notice from Supreme Court: cross-petition for certiorari filed Supreme Court No. 91-7348 filed on 2/18/92. [86-3983] (jlc)

4/20/92 Supplemental Criminal Justice Act voucher sent (1404016 Voucher #) to Cliff Gardner for Appellant Thomas E. Creech per atty's request. [86-3983] (rv)

4/30/92 Received Appellant atty Gardner's addendum to supplemental CJA voucher: cert. petition copies. 4/28/92 [86-3983] (mlm)

5/4/92 Supplemental CJA voucher (Voucher #1404016-3 for $15,593.50c to CHH) forwarded to panel judge for approval. [86-3983] (mlm)

7/6/92 Received notice from Supreme Court, petition for certiorari GRANTED on 6/15/92 (SC# 91-1160). (PANEL) (jlc)

IN THE DISTRICT COURT
OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO IN AND FOR
THE COUNTY OF ADA

THE STATE OF IDAHO, Plaintiff,	)	
vs.	)	INFORMATION
THOMAS EUGENE CREECH, Defendant.	)	(Filed June 8, 1981)

JIM C. HARRIS, Prosecuting Attorney in and for the County of Ada, State of Idaho, who in the name and by the authority of said State, prosecutes in its behalf, in proper person comes now into said District Court of the County of Ada, and gives the Court to understand and be informed that THOMAS EUGENE CREECH (is) ~~are~~ accused by this Information of the crime of MURDER IN THE FIRST DEGREE, Felony, I.C. 18-4001, 18-4003 (c)(e), having been duly brought before a magistrate on the 29th day of May, 1981, and having had his preliminary hearing therein upon said charge(s) by said magistrate thereupon held to answer to the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, to said charge(s), which said crime(s) was committed as follows, to-wit:

That the said defendant, THOMAS EUGENE CREECH, on or about the 13th day of May, 1981, in the County of Ada, State of Idaho, while the said defendant, THOMAS EUGENE CREECH, was under a sentence for Murder in the First

Degree and/or while the said THOMAS EUGENE CREECH was incarcerated in a penal institution, to-wit: the Idaho State Correctional Institution, did commit murder upon an inmate of the said penal institution, to-wit: one David Dale Jensen, by wilfully, unlawfully, deliberately and with malice aforethought, killing and murdering the said David Dale Jensen, a human being, by hitting the said David Dale Jensen in the head with a blunt object and kicking the said David Dale Jensen in the head and neck with his feet, thereby mortally wounding the said David Dale Jensen from which he sickened and died in the County of Ada, State of Idaho, on the 13th day of May, 1981.

All of which is contrary to the form, force and effect of the statute in such case made and provided and against the peace and dignity of the State of Idaho.

/s/ JC Harris
JIM C. HARRIS
Ada County Prosecuting Attorney

IN THE DISTRICT COURT
OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF ADA

HON. ROBERT G. NEWHOUSE
DISTRICT JUDGE

June 19, 1981
DATE

COURT MINUTES

The State of Idaho,
Plaintiff,
vs.
THOMAS EUGENE CREECH,
Defendant(s).

Criminal
No. 10252

Appearances: Tape No. L352 815 thru 831

Ron Howen
Deputy Prosecuting
Attorney — Counsel for State

Tom Morden
Ada County Public
Defender — Counsel for Defendant(s)

THIS TIME SET FOR INITIAL ARRAIGNMENT:

✓ The Court informed the Defendant(s) of the charge(s) filed being a felony and of the possible penalties which could be imposed.

✓ The Court advised the Defendant(s) of the right to Counsel at public expense in all proceedings in this Court.

___ Right to Counsel waived by Defendant(s).

✓ Public Defender reaffirmed/appointed to represent Defendant(s).

___ Mr. _____ appearing as counsel of record for Defendant(s).

✓ The Court advised the Defendant(s) of the right to appeal from any judgment entered by this Court, to be represented by Counsel in said appeal and of payment of costs incurred in said appeal at public expense and of the appeal time being forty-two (42) days.

✓ True copy of the Information delivered to the Defendant(s) and Counsel.

✓ True name(s).

___ Defendant(s) corrected name is _____ .

✓ Formal reading of the Information waived by Defendant(s).

___ Upon direction of the Court, the Clerk read the Information to the Defendant(s).

✓ The Court advised the Defendant(s) of the different pleas that could be entered to the charge(s) set forth in the Information and of the statutory time, not less than one day, that could be taken before entering a plea(s).

___ Upon the request of the Defendant(s), the Court continued this matter until _____ for entry of a plea(s).

___ Statutory time waived by Defendant(s).

✓ In answer to the Court, the Defendant(s) entered a plea(s) of "Not guilty".

✓ There being no objection by the Defendant(s), the Court set this case for trial before the

Court and a jury at 9:00 A.M. on November 2, 1981 for 10 days .

___ In answer to the Court, the Defendant(s) entered a plea(s) of "Guilty".

___ Defendant(s) sworn and examined regarding plea(s).

___ The Defendant(s) indicated an understanding of the possible penalties and that no promises of leniency or threats had been made to induce the plea(s).

___ The Defendant(s) fully understands that the pleading "Guilty" the presumption of innocence, the constitutional right to a trial by jury, the right to confront accusers, the privilege against self-incrimination and the right of self-defense are waived. All legal and factual defenses and any defects in the State's case are waived.

___ The Court accepted the Defendant(s) plea(s) of "Guilty".

___ The Court set aside the Defendant(s) plea(s) of "Guilty" and directed the Clerk to enter a plea(s) of "Not Guilty" on behalf of the Defendant(s).

✓ Request for Discovery filed.

✓ Requested Compliance date set for July 3, 1981.

___

___ The Court ordered a Pre-Sentence Report and continued this matter until _____, 19__ at ___ P.M. for said report and disposition.

✓ Defendant(s) remanded to the custody of the Sheriff.

___ Defendant(s) continued on bond.

___ Defendant(s) continued on own recognizance.

REPORTER: Grace Tucker

ESTIMATED COST: $25.00

CLERK: Glenda

DATE: June 19, 1981

APPROVED BY:

/s/ Robert G. Newhouse
District Judge

IN THE DISTRICT COURT
OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF ADA

HON. ROBERT G. NEWHOUSE
DISTRICT JUDGE

August 28, 1981
DATE

COURT MINUTES

THE STATE OF IDAHO,
Plaintiff,

vs.

THOMAS EUGENE CREECH,
Defendant,

Case No. 10252

Tape No. L363 174 thru 253

Jim C. Harris
Ada County Prosecuting
Attorney — Counsel for state

Rolf Kehne
Ada County Public
Defender — Counsel for defendant

Defendant present with counsel, in custody.

Court reviews case.

Defense counsel requests courtroom be cleared. State objects and leaves matter to court's discretion.

Defense counsel comments re gag order. State comments re gag order speaks only to evidence.

Further argument by defense. Court orders courtroom cleared.

Jerry Sass, statesman, requests their attorney's presence to argue this matter. Court allows him to contact his counsel.

Courtroom cleared by bailiffs and marshalls.

Defense counsel comments, Mr. Creech wishes to enter a plea of guilty against Mr. Kehne's wishes and requests one week continuance.

State comments a continuance should be left to the defendants choice and unless defendant wishes a continuance the state objects.

Court inquires of defendant.

190 Defendant wishes to enter plea and requests the plea be entered today. Defendant has no objection to the public being present during the plea.

191 Defense counsel moves to withdraw from this case, as defendant will not follow his advise in this matter.

Motion DENIED by court.

Court will allow defendant to enter a plea of guilty and will allow the press and public to be present in the courtroom.

Defense counsel comments, Mr. Creech has been seen by a medical examiner and wishes to reserve the right to withdraw the plea if the medical report would deem it appropriate. So ordered.

Bailiffs allow press and public to re-enter the courtroom.

All present and ready to proceed.

Court directs clerk to enter plea of GUILTY.

State requests they may make an offer of proof regarding trial evidence.

199 THOMAS EUGENE CREECH sworn as to guilty plea.

200 State comments re trial facts in regard to this case.

202 State's exhibits 1, 2, 3, 4, 5,6,7, 8, 9, 10, 11, 12, 13, 14 and 15 are marked

State offers above listed exhibits.
Defense objects, exhibits irrelevant. Arguemnt [sic] by states.

Court will allow exhibits to be marked as more explicit argument, not as evidence.

213 State's 1, 2, 3, 4, 5,6, 7, 8, 9, 10, 11, 12, 13, 14, and 15 admitted.

State requests submitting depositions as part of the pre-sentence report.

State will request death penalty and wishes to submit a brief, if plea is accepted the state wishes to respond further.

No comment by defense counsel unless ordered to do so.

228 Court examines defendant as to guilty plea.

243 State examines defendant.
No questions by defense counsel.

246 Court accepts GUILTY plea.

Court orders pre-sentence investigation, report must be submitted to counsel seven days prior to sentencing.

Defense requests sentencing be set after they have received the report.

Court continues to September 25, 1981 at 9:00 a.m. for appearance and to reset sentencing.

State comments they will not be available until October 21.

Defendant REMANDED.

REPORTER: Grace Tucker
ESTIMATED COST: $25.00
CLERK: Glenda
DATED: August 28, 1981

Approved by:

/s/ Robert G. Newhouse
DISTRICT JUDGE

IN THE DISTRICT COURT
OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF ADA

HON. ROBERT G. NEWHOUSE
DISTRICT JUDGE

January 11, 1982
DATE

COURT MINUTES

The State of Idaho,
Plaintiff,
vs.
THOMAS EUGENE CREECH,
Defendant,

NO. 10252

Appearances:

Tape No.	AA-45	0066	thru	2576
	AA-46	0003	thru	3348
Tape No.	AA-47	0001	thru	1294

Jim C. Harris
Ada County Prosecuting Attorney — Counsel for state

Rolf Kehne
Weibe and Associates — Counsel for defendant

SENTENCING HEARING: 9:00 a.m.

Defendant present with counsel, in custody.

Court reviews case. State and defense ready to proceed.

0136 State makes opening statements and requests the court to take judicial notice of the entire file and pre-sentence reports. State submits Death Warrant to the court.

0155 Defense objects to judicial notice of file and objects to the court reading the pre-sentence report.

0200 State argues.

0251 Court denies motion and takes judicial notice of the file and pre-sentence reports.

0271 State calls first witness.

0306 LAMAR HEYREND sworn and examined as state's witness.

0767 Defense requests brief recess.

9:57 a.m.

10:32 a.m. Court reconvened. All present.

0792 LAMAR HEYREND resumes stand for cross-examination by defense.

REPORTER: Dianne Cromwell

ESTIMATED COST: $300.00

CLERK: Glenda Longstreet

DATE: January 11, 1982

Approved by:

/s/ Robert G. Newhouse
District Judge

1546 Re-direct examination.

1575 Witness excused.

1588 CHUCK PALMER sworn and examined as state's witness.

2576 Examination by defense.

3140 NEW TAPE AA-46

0003 CHUCK PALMER's cross-examination continues.

0127 Re-direct examination by state.

0136 Witness finished.

0141 DAN DOUGHIT sworn and examined as state's witness.

0195 State's exhibits 1, 2, 3, 4, 5, 6 and 7 are marked.

0256 State's 1, 2, 3, 4 offered.

0282 Cross examination as to state's exhibits. Defense objects to their admission.
State's exhibits 1, 2, 3, 4 admitted.
Direct examination of witness continues.
State's exhibits 5, 6 and 7 offered.

0447 Cross examination by defense.

0466 Re-direct examination by state.

0488 Re cross examination by defense.

0559 Re-re-direct examination by state.

0582 Witness finished.

0591 Court recessed until 1:30 p.m. this afternoon.

1:30 p.m. Court reconvened. All present, defendant in custody.

0620 LARRY E. WRIGHT sworn and examined as state's witness.

0724 Cross-examination by defense.

0847 Witness finished.

0854 DALE JENSEN sworn and examined as state's witness.

1114 Cross examination by defense – no questions.

1127 Witness excused.
State rests.
Brief recess.

2:15 p.m. Court reconvened, all present.

1151 JOHN STONER sworn and examined as defense witness.

2354 Cross examination by state.

2708 Re-direct examination by defense.

2961 Defendants exhibit A is marked and admitted.

3268 Defendant's exhibit B marked and admitted.

3348 NEW TAPE AA-47

0020 Court examines witness.
Witness excused.

0049 JIM HOPE sworn and examined as defense witness.

0081 Witness excused.

0088 Brief recess. 3:10 p.m.

3:23 p.m. Court reconvened. All present, defense counsel not present.

0109 Defense counsel now present and ready to proceed.

3:24 p.m.

0118 THOMAS EUGENE CREECH sworn by clerk. Witness makes a statement to the court.

0516 Direct examination by defense.

0605 Cross examination by state.

0649 Re-direct examination by defense.

0675 Witness finished.

3:44 p.m. Defense rests.

0700 State's closing arguments.

0867 Defense closing arguments.

1128 Further argument by state.

1204 Court advises defendant of appeal rights and in this case a possible automatic appeal.

Court takes sentencing under advisement.

1259 Defense counsel requests their pre-sentence report be released to the defendant.

No objection by state. Court so orders.

1280 State requests the gag order in this matter be lifted.

1294 Court lifts the gag order, state to prepare order.

State's pre-sentence report returned to clerk.

Defendant REMANDED.

IN THE DISTRICT COURT
OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO, Plaintiff, vs. THOMAS EUGENE CREECH, Defendant.	)	Case No. 10252 (Filed Jan. 25, 1982)

* * *

FINDINGS OF THE COURT
IN CONSIDERING THE DEATH PENALTY
UNDER SECTION 19-2515, Idaho Code

The above defendant having entered a plea of guilty to the criminal offense of Murder of the First Degree, which under the law authorizes the imposition of the death penalty; and the court having ordered a presentence investigation of the defendant and thereafter held a sentencing hearing for the purpose of hearing all relevant evidence and argument of counsel in aggravation and mitigation of the offense;

NOW THEREFORE the Court hereby makes the following findings:

1. Conviction. That the defendant while represented by court-appointed counsel, Rolf Kehne, was found guilty of the offense of Murder in the First Degree pursuant to a plea of guilty.

2. Presentence Report – That a presentence report was prepared by order of the court and delivered to the defendant or his counsel at least seven (7) days prior to the sentencing hearing pursuant to 19-2515, Idaho Code, and the Idaho Criminal Rules.

3. Sentencing Hearing. That a sentencing hearing was held on January 11, 1982, pursuant to notice to counsel for the defendant; and that at said hearing, in the presence of the defendant, the court heard relevant evidence in aggravation and mitigation of the offense and arguments of counsel.

4. Facts and Argument Found in Mitigation.

(a) That the defendant is a mature man, 31 years of age.

(b) That the defendant is probably employable, and is capable of being further trained and educated. He is of an adequate intelligence, and is an extremely talented writer.

(c) That the defendant did not instigate the fight with the victim, but the victim, without provocation, attacked him. He was initially justified in protecting himself.

5. Facts and Arguments Found in Aggravation.

(a) That the defendant has, repeatedly, throughout his life, committed many murders.

(b) That the victim was a young, inexperienced, handicapped man. He had both physical and mental impairments.

(c) That the victim, once the attack commenced, was under the complete domination and control of the defendant. The murder itself

was extremely gruesome evidencing an excessive violent rage. With the victim's attack as an excuse, the defendant's murder then took on many of the aspects of an assassination. These violent actions of the defendant went well beyond self-defense.

(d) That the defendant indicates an intention to commit continued murders in the future, which, based on his record, is extremely probable.

(e) That the defendant, heretofore, has been sentenced to death by the district court of the State of Idaho. Such death sentence was reversed by the Idaho Supreme Court.

(f) That the defendant is unable to be rehabilitated.

(g) That, during the incident, the defendant was not under the influence of any mind-controlling substance. The murder, once commenced, appears to have been an intentional, calculated act.

6. Statutory Aggravating Circumstances Found under Section 19-2515(f), Idaho Code.

These aggravating circumstances are all found by this Court to be beyond a reasonable doubt.

A. The defendant was previously convicted of another murder, to-wit:

1. March 25, 1976. Two Counts of First Degree Murder. Sentenced to life on each charge.

2. April 23, 1979. First Degree Murder. Sentence was 99 years.

3. November 4, 1980. First Degree Murder. Sentence was life.

B. By the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life. After the victim was helpless the defendant killed him.

C. The murder was one defined as Murder of the First Degree by Section 18-4003, Idaho Code, Subsection (c). The defendant was under a sentence for Murder of the First Degree at the time of his actions.

D. The murder was one defined as Murder of the First Degree by Section 18-4003, Idaho Code, Subsection (e). The defendant committed the murder on a fellow inmate while both were incarcerated in the Idaho State Correctional Institution.

E. The defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society. It is clear from the entire proceedings that the defendant will murder again, and again, unless physically restrained. This court does not know how this can be done since, after all, the defendant committed the present offense while in maximum security.

7. Reasons Why Death Penalty Was Imposed.

This defendant intentionally destroyed another human being at a time when he was completely helpless. He has repeatedly murdered others over, and over, and over again. He intends to keep on killing and can't be

stopped. This court knows of no way to protect the society which it represents except by an execution. If the Death Penalty had been invoked before, many citizens would remain alive.

The defendant has made many requests upon this Court to impose this Death Penalty. In that regard a comment is in order. This Court does not impose the Death Penalty because of these pleadings or public demonstrations made by the defendant. A Court should not grant anyone legal suicide. This Court imposes the Death Penalty upon this defendant because he earned it.

The Court finds that the mitigating circumstances do not outweigh the gravity of the aggravating circumstances so to make unjust the imposition of the Death Penalty.

That the Death Penalty should be imposed on the defendant for the capital offense of which he was convicted.

Dated this 25th day of January, 1982.

/s/ Robert G. Newhouse
ROBERT G. NEWHOUSE
District Judge

IN THE DISTRICT COURT
OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO, Plaintiff,	)	Case No. 10252
vs.	)	JUDGMENT OF
THOMAS EUGENE CREECH,	)	CONVICTION
Defendant.	)	(Filed Jan. 25, 1982)

This being the time fixed by the Court for pronouncing sentence upon the defendant, the Court noted the presence of Jim C. Harris, Prosecuting Attorney of Ada County, Idaho, Thomas Eugene Creech, the defendant, and Rolfe Kehne, attorney for the defendant, in Court.

The defendant was duly informed as follows:

1. Of the Information filed against the defendant for the crime of MURDER IN THE FIRST DEGREE, 18-4001 and 18-4003 of the Idaho Code, committed on or about May 13, 1981.

2. Of the defendant's plea of guilty on this charge on August 28, 1981.

The Court, then, after this plea of guilty, ordered a presentence investigation, and convened a sentencing hearing for the purpose of hearing all relevant evidence and arguments of counsel in aggravation and mitigation of the offense, in accordance with 19-2515 of the Idaho Code, and Rule 33.1 of the Idaho Criminal Rules; and the Court having entered written findings setting forth the

statutory aggravating circumstances found, and the mitigating circumstances considered; and the Court having found that the mitigating circumstances found do not outweigh the aggravating circumstances found so as to make unjust the imposition of the death penalty; and the Court having found no legal cause or reason why judgment and sentence should not be pronounced against the defendant at this time; does render its judgment of conviction as follows, to wit:

That, whereas, the defendant having plead guilty in this Court to the crime of Murder in the First Degree, 18-4001 and 18-4003 of the Idaho Code.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the defendant, Thomas Eugene Creech, is guilty of the crime of Murder in the First Degree, 18-4001 and 18-4003 of the Idaho Code, and that he be sentenced on this charge to be punished by death by the Idaho State Board of Correction, on March 12, 1982 at 9:00 a.m., in the manner prescribed by law. The defendant may remain in the Ada County Jail until his sentence is to be executed.

Dated this 25th day of January, 1982.

/s/ Robert G. Newhouse
ROBERT G. NEWHOUSE
District Judge

In the Supreme Court of the State of Idaho

STATE OF IDAHO, Plaintiff-Respondent,	)	Supreme Court No. 14480
v.	)	ORDER
THOMAS EUGENE CREECH, Defendant-Appellant.	)	(Filed Feb. 25, 1983)

In the above-entitled cause, defendant Creech entered a plea of guilty to a charge of first degree murder and in accordance with I.C. § 19-2515, the district court conducted a hearing into mitigating or aggravating circumstances and thereafter on the 25th day of January, 1982, the district court purported to impose the death sentence upon the defendant; and

The cause being before this Court both on appeal by the defendant and also pursuant to the automatic review of death sentences mandated by I.C. § 19-2827; and

It appearing from the record, without any contention otherwise by the respondent State of Idaho, that contrary to the requirements of I.C. § 19-2503 and I.C.R. 43(a), the trial judge purported to impose sentence in the absence of defendant and his counsel and without the presence of defendant and his counsel in open court, but rather by means of a written imposition of a sentence of death;

NOW, THEREFORE, IT IS HEREBY ORDERED that the sentence of death imposed upon the defendant in the absence of the defendant and his counsel be and the same

hereby is vacated and the cause is remanded to the Honorable Robert Newhouse, District Judge of the Fourth Judicial District of the State of Idaho, Ada County, who shall within fourteen (14) days from the date of this Order, in open court and in the presence of defendant and his counsel, enter a judgment of conviction and impose such sentence upon the defendant Thomas Eugene Creech as to the said District Judge may appear to be just and appropriate. In the event that said Judge shall impose a sentence of death, a warrant therefore shall issue in accordance with I.C. § 19-2705; and

IT IS FURTHER ORDERED that on the completion of said proceedings a transcript thereof shall be immediately prepared, delivered and lodged with this Court not later than five (5) days from the completion of said proceedings; and

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this cause pending compliance with this Order and thereafter will determine the issues on appeal; and

IT IS FURTHER ORDERED that this Order be served upon the Honorable Robert G. Newhouse, District Judge of the Fourth Judicial District, the Office of the Attorney General, and counsel for the defendant.

DATED this 24th day of February, 1983.

By Order of the Supreme Court.

/s/ Allan G. Shepard
ALLAN G. SHEPARD,
Acting Chief Justice

ATTEST: /s/ Judy E. Czymich
Deputy Clerk

IN THE DISTRICT COURT
OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO, Plaintiff, vs. THOMAS EUGENE CREECH, Defendant,	)	Case No. 10252 ORDER (Filed Mar. 15, 1983)

In accordance with the several orders of the Idaho Supreme Court, and good cause appearing therefore:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendant Thomas Eugene Creech, and his counsel, appear in front of this court on Thursday, March 17, 1983 at 9:00 A.M. so that this court may conduct a hearing and carry out all of the directives of the Idaho Supreme Court.

Dated this 15th day of March, 1983.

/s/ Robert G. Newhouse
ROBERT G. NEWHOUSE
District Judge

ADA COUNTY PUBLIC DEFENDER
Attorneys for Defendant
303 W. Bannock
Boise, Idaho 83702
Telephone: 343-6466

IN THE DISTRICT COURT
OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO, Plaintiff, -vs- THOMAS CREECH, Defendant.	Criminal No. 10252 MOTION VACATING SENTENCING HEARING and RESET (Filed Mar. 16, 1983)

COMES NOW, the above named Defendant, by and through his Attorney of Record, ROLF M. KEHNE, and respectfully moves this Honorable Court for its order vacating and resetting the sentencing hearing. This motion is supported by affidavit of counsel, attached hereto and incorporated by reference herein.

Dated this 16th day of March, 1983.

/s/ Rolf M. Kehne
ROLF M. KEHNE
Attorney for Defendant

ADA COUNTY PUBLIC DEFENDER
Attorneys for Defendant
303 W. Bannock
Boise, Idaho 83702
Telephone: 343-6466

IN THE DISTRICT COURT
OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO, Plaintiff, -vs- THOMAS CREECH, Defendant.	Criminal No. 10252 AFFIDAVIT IN SUPPORT OF MOTION TO VACATE

STATE OF IDAHO)
ss.
County of Ada)

ROLF M. KEHNE, being first duly sworn upon his oath, deposes and says:

1. That I am the Attorney of Record, in the above entitled action;

2. That my office staff informed me that notice of the time and date for sentencing was given approximately noon, March 15, 1983;

3. That I received actual notice of the time and date the evening of March 15, 1983;

4. One and one half (1½) days is insufficient time to prepare and present witnesses on behalf of the defendant.

/s/ Rolf M. Kehne
ROLF M. KEHNE

SUBSCRIBED and SWORN to before me this 16th day of March, 1983.

/s/ Diane Gleason
Notary Public for Idaho
Residing at Boise, Idaho

IN THE DISTRICT COURT
OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF ADA

HON. ROBERT G. NEWHOUSE — March 17, 1983
District Judge — Date

COURT MINUTES

The State of Idaho, Plaintiff, vs. Thomas Eugene Creech, Defendant.	)	No. 10252

TIME SET FOR RESENTENCING:

Appearances: Tape No. X66 0386 thru 0463

Greg Bower — Counsel for the State
Prosecuting Attorney

Rolf Kehne — Counsel for the Defendant
Deputy Public Defender

0386 9:17 Call of the case by the Court with review regarding defendants being filed.

The Court reviews prior procedures and comments on reading the Courts findings.

The defense objects. There is no objection by the State.

0390 The Court reads the findings of the Court in open court.

0403 The Court reaffirms these findings.

0404 The defense enters objections to the findings of the Court.

0417 Response by the State.

0419 Further comments by the defense.

0420 The Court denied objection of the defense.

Defense files motions with the Court. There is no objection by the State.

0422 The Court files in open court the defense motions.

0423 Comments by the defense regarding the motion to vacate hearing.

There is no response by the State.

0426 The Court denied motion to vacate hearing.

0428 Comments by the defense and Court.

The Court directs the State to prepare an order denying defense motion to vacate sentencing hearing and resetting it.

0431
9:40 Court in recess for the State to obtain copies of motions filed by the defense.

9:50 Court reconvened with comments by State regarding receiving copies of the motions.

0433 Comments by the defense regarding motion to suspend proceedings.

Response by the State.

0435 Further comments by the defense.

The Court denies motion and directs State to prepare order.

Comments by the defense regarding demand for jury is part of hearing.

Response by the State.

0436 The Court denies and directs State to prepare order.

Comments by the defense regarding motion for live witnesses, motion to compel, motion for disclosure, motion and order for locations of inmates of 9 house #C, motion for inspections and motion for release of pre-sentence investigation.

0443 The Court grants the order for pre-sentence investigation.

There is no objection by the State.

Court signed in open Court order for pre-sentence investigation.

0444 The State comments regarding motions being moot.

Response by the defense.

Court denied all motions of defense and directs the State to prepare the orders.

0445 Comments by the State regarding custody of defendant.

0446
10:00 The Court is in recess by request of the defense.

10:40 Court is reconvened. The defense comments regarding filing motion with the Supreme Court and requests continuance to prepare for live testimony.

The motion is denied by the Court.

0450 The Court is to impose sentence with review of prior Court proceedings and acknowledges the pre-sentence investigation.

0454 The defense comments in objection to sentencing today.

The Court denied the motions of the defense.

The Court affirms the findings of the Court and reads the Judgment of Conviction. Orders death penalty to be executed April 29, 1983 at 9:00 a.m.

The Court will allow the sheriff 24 hours to transfer the defendant to the custody of I.S.B.C.

The defense comments regarding custody.

The state responds.

0461 Court will allow the defendant to remain in Ada County Jail until the imposition of the sentence until objections are made by I.S.B.C.

The defense comments with the Court.

The Court directs the State to prepare Death Warrant.

0463 The defendant is remanded.
10:50

REPORTER: Grace Tucker

ESTIMATED COST: $100.00

CLERK: Mary Gwyn/by Liz

DATE: March 18, 1983

APPROVED BY:

/s/ Robert G. Newhouse
District Judge

[p. 8] BOISE, IDAHO

Thursday, March 17, 1983, 9:15 a.m.

APPEARANCES:

For Plaintiff GREG H. BOWER
Ada County Prosecuting Attorney
103 Ada County Courthouse
Boise, Idaho 83702

For Defendant ROLF M. KEHNE
Ada County Public Defender
303 West Bannock
Boise, Idaho 83702

THE COURT: I will now take up the case of the State of Idaho, Plaintiff, versus Thomas Eugene Creech, case number 10252 on the court docket.

This matter is in front of the Court upon remand and order of the Idaho Supreme Court.

I do note for the record that a lot of motions were filed on behalf of the defendant yesterday.

Before we take up this matter, I think it would be proper to go through and outline the procedure, since it might be a little confusing to various parties, so that we make sure everybody is with us in this regard.

This matter was remanded back on [p. 9] February 24th, 1983 by the Idaho Supreme Court ordering this Court to enter a judgment of conviction and impose such sentence upon the defendant as to the district judge may appear to be just and appropriate.

This matter was stayed and the stay has been lifted and is now back in front of the Court in that regard.

For the record, it appears to the Court that there are other matters that properly should be read in open court. And in lieu of any legal objections by either counsel, it is the intent of this Court to read the Court's findings before we take up the motions and the other matters.

Are there any objections, since there seems to be some question in regard to reading these matters, to reading the Court's findings heretofore entered by the Court?

Mr. Kehne?

MR. KEHNE: I don't object to your reading them into the record, Your Honor. We object to several of the findings themselves.

THE COURT: Very well. The record will note your statements in that regard.

Mr. Bower, do you have any objections?

MR. BOWER: No, Your Honor.

[p. 10] THE COURT: Very well. The Court having heretofore and on January 25th, 1982, having entered the following findings, I will read the same for the benefit of Mr. Creech, since they have never been read formally in open court. (Reading:)

"FINDINGS OF THE COURT IN CONSIDERING THE DEATH PENALTY UNDER SECTION 19-2515, Idaho Code.

"The above defendant having entered a plea of guilty to the criminal offense of Murder of the

First Degree, which under the law authorizes the imposition of the death penalty; and the Court having ordered a presentence investigation of the defendant and thereafter held a sentencing hearing for the purpose of hearing all relevant evidence and argument of counsel in aggravation and mitigation of the offense;

"NOW THEREFORE the Court hereby makes the following findings:

"1. *Conviction.* That the defendant while represented by court-appointed counsel, Rolf Kehne, was found guilty of the offense of Murder in the First Degree pursuant to a plea of guilty.

"2. *Presentence Report.* That a presentence report was prepared by order of the court and delivered to the defendant or his counsel at least seven days prior to the sentencing hearing pursuant [p. 11] to 19-2515, Idaho Code, and the Idaho Criminal Rules.

"3. *Sentencing Hearing.* That a sentencing hearing was held on January 11, 1982, pursuant to notice to counsel for the defendant; and that at said hearing, in the presence of the defendant, the Court heard relevant evidence in aggravation and mitigation of the offense and arguments of counsel.

"4. *Facts and Argument Found in Mitigation.*

(a) That the defendant is a mature man, 31 years of age.

(b) That the defendant is probably employable, and is capable of being further trained and educated. He is of an adequate intelligence, and is an extremely talented writer.

(c) That the defendant did not instigate the fight with the victim, but the victim, without provocation, attacked him. He was initially justified in protecting himself.

"5. *Facts and Arguments Found in Aggravation.*

(a) That the defendant has, repeatedly, throughout his life, committed many murders.

(b) That the defendant has, repeatedly, throughout his life, committed many murders.

(b) That the victim was a young, inexperienced, handicapped man. He had both physical and mental impairments.

[p. 12] (c) That the victim, once the attack commenced, was under the complete domination and control of the defendant. The murder itself was extremely gruesome evidencing an excessive violent rage. With the victim's attack as an excuse, the defendant's murder then took on many of the aspects of an assassination. These violent actions of the defendant went well beyond self-defense.

(d) That the defendant indicates an intention to commit continued murders in the future, which, based on his record, is extremely probable.

(e) That the defendant, heretofore, has been sentenced to death by the district court of the State of Idaho. Such death sentence was reversed by the Idaho Supreme Court.

(f) That the defendant is unable to be rehabilitated.

(g) That during the incident the defendant was not under the influence of any mind-controlling substance. The murder, once commenced, appears to have been an intentional, calculated act.

"6. *Statutory Aggravating Circumstances Found Under Section 19-2515(f). Idaho Code.*

These aggravating circumstances are all found [p. 13] by this Court to be beyond a reasonable doubt.

"A. The defendant was previously convicted of another murder, to-wit:

1. March 25, 1976. Two counts of First Degree Murder. Sentenced to life on each charge.

2. April 23, 1979. First Degree Murder. Sentence was 99 years.

3. November 4, 1980. First Degree Murder. Sentence was life.

"B. By the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life. After the victim was helpless the defendant killed him.

"C. The murder was one defined as Murder of the First Degree by Section 18-4003, Idaho Code, Subsection (c). The defendant was under a sentence for Murder of the First Degree at the time of his actions.

"D. The murder was one defined as Murder of the First Degree by Section 18-4003, Idaho Code, Subsection (e). The defendant committed the murder on a fellow inmate while both were

incarcerated in the Idaho State Correctional Institution.

"E. The defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited [p. 14] a propensity to commit murder which will probably constitute a continuing threat to society.

"It is clear from the entire proceedings that the defendant will murder again, and again, unless physically restrained.

"This Court does not know how this can be done since, after all, the defendant committed the present offense while in maximum security.

"7. *Reasons Why Death Penalty Was Imposed.*

"This defendant intentionally destroyed another human being at a time when he was completely helpless. He has repeatedly murdered others over, and over, and over again. He intends to keep on killing and can't be stopped. This court knows of no way to protect the society which it represents except by an execution. If the Death Penalty had been invoked before, many citizens would remain alive.

"The defendant has made many requests upon this Court to impose this Death Penalty. In that regard a comment is in order. This Court does not impose the Death Penalty because of these pleadings or public demonstrations made by the defendant. A Court should not grant anyone legal suicide. This Court imposes the Death Penalty upon this defendant because he earned it.

"The Court finds that the mitigating [p. 15] circumstances do not outweigh the gravity of the aggravating

circumstances so as to make unjust the imposition of the Death Penalty.

"That the Death Penalty should be imposed on the defendant for the capital offense of which he was convicted.

"Dated this 25th day of January, 1982, signed by myself as district judge." (End reading.)

For the record, at this time I do affirm and reiterate these findings as of today.

Now, I will take up any matters we should take up before carrying out the mandate and order of the higher court in this particular proceeding.

And in that regard, Mr. Kehne, do you have anything that you would like to say on behalf of your client, and I do note these motions have been filed and you may approach them in any manner you wish.

MR. KEHNE: I would first like to put on the record my objection to the findings just read by the Court.

I would like to start with Section 4 of the Facts and Arguments Found in Mitigation. We don't object to any in that section.

In Section 5, Facts and Arguments Found in [p. 16] Aggravation, the Court has listed a whole series of aggravating factors which, according to the way this is written, I assume were weighed against the mitigating factors in arriving at the death penalty.

It was wrong to place any of these factors in the findings and it was wrong to weigh them because they are not statutory aggravating factors. We had no notice during the sentencing hearing that these particular factors were being considered as aggravating factors.

Further, the statute itself in its text does not allow the consideration of any aggravating factors other than those specifically enumerated in the statute.

And furthermore, the cruel and unusual and due process clauses do not allow the Court to weigh nonstatutory aggravating factors against mitigating factors in arriving at the death penalty.

We specifically object as facts that the victim was a young, inexperienced, handicapped man, and we would submit to the Court that the evidence shows that he was a young tough seeking a reputation for toughness and that was his motive for attacking Tom Creech to gain that reputation among the convicts.

That the victim was under the complete domination and control of the defendant, that the murder was extremely gruesome, that the killing was like an [p. 17] assassination. Again, these are nonstatutory aggravating factors and we submit they are inconsistent with the facts of the case. An assassination would seem to be a cold, calculated, unemotional murder.

And there's no question but this killing was in response to the second unprovoked deadly-force attack by David Jensen on Mr. Creech in the same day. And there was nothing cold or emotionless about his response to the attack.

Again, D and E are nonstatutory factors and therefore should not have been considered by the Court, the same with F and G.

And we submit that the facts are inconsistent with the Court's finding that the murder once commenced appears to be an intentional calculated act and that he was – by the uncontradicted testimony of the psychologist, the most intelligent way to look at Tom's actions at the time of the crime, shows anything but calculation.

In fact, he was out of control and unable to control his response and probably not aware of what he was doing at the time of repeated self defense due to his mental illness.

The Statutory Aggravating Circumstances, we object to 6(a) because there has been no competent proof [p. 18] of prior convictions in the case. There is well-established procedure under Idaho law for proving prior convictions; we do it in habitual criminal trials all the time. And no such evidence was presented to the Court.

We object to Finding B, the utter disregard, because, first of all, utter disregard is unconstitutional and vague and overbroad and violates a cruel and unusual clause for its failure to adequately channel the sentencing authority's discretion.

We also object to it on the facts of the case. Whatever the legislature meant by "utter disregard," which the Supreme Court defined further and refined further in Osborn, it can't possibly be applied to a killing that is in response to an unprovoked deadly-force attack by the

victim. It cannot be applied to a victim-precipitated homicide.

The finding is also inadequate for failure to show that the Court has appreciated the refinement and the gloss that the Osborn case puts on that language as ordered by the Supreme Court of this state.

We object to Findings C and D in the statutory list because there are no such aggravating factors in the statutory list.

The Court has found and weighed two factors [p. 19] in its Statutory Aggravating Circumstances findings that are nowhere in the statute; they do not exist.

We object to the last finding in the Section E, first of all, because the propensity to commit murder which will probably constitute a continuing threat to society language, allows the finding of something beyond a reasonable doubt, which is only probable and it is therefore unconstitutional.

We also object to it on the facts. We would submit to the Court that that finding should not be looked at, or that aggravating factor should not be looked at, in isolation: how dangerous Tom might be if we let him out on the street tomorrow.

It should be looked at as how dangerous he is in particular circumstances he finds himself. He must be the world's least likely parole candidate. It is very doubtful he would ever be made a trusty again. In fact, it is unthinkable.

It is unthinkable that he would spend the rest of his life any way other than in isolation and locked up and

free from being harmed by other people or being in a position that he could harm other people.

And we would also like to note to the Court that the language in the subsection itself is aimed right at the particular offense. Nothing about Tom's [p. 20] background or his record or his personality traits are properly taken into consideration there.

The factor is aimed solely at the facts of the particular case. And recalling that this case started out as self defense, it's a crime only because it was an excessive response to self-defense;

That this particular crime does not show that Tom is a continuing threat to anyone other than people who attack him with deadly-force and without provocation. Thank you.

THE COURT: Thank you very much, Mr. Kehne.

Mr. Bower, do you desire to make any comments in that regard for the record?

MR. BOWER: Your Honor, the only comment I care to make is with regard to counsel's approach to your statutory aggravating circumstances under A.

And I think that there certainly is no requirement in a sentencing hearing when the Court's own investigator prepares a criminal record for the Court that would come forward and prove something to the Court in a sentencing hearing as if we are proving an habitual offender case to the jury.

I certainly think that the Court's investigator's report shows practices and processes in preparing what was a very carefully done presentence [p. 21] report and a very carefully done presentencing hearing are appropriate. Thank you.

THE COURT: Thank you, Mr. Bower.

Mr. Kehne, do you have any further response you [would] like to make in regard to these objections?

MR. KEHNE: I would like to add that originally we filed a demand that the sentencing and the findings be done according to the statute on sentencing hearings 19-2516, which states in mandatory language that the circumstances shall be inquired into by live witnesses under oath.

And the circumstances they must be talking about in that section are the statutory aggravating and mitigating circumstances in the prior section, 2515.

And we still stand on that demand and we still believe it is our right to have the Court make its findings only on the basis of live witnesses, and I just want the record to be clear that we are not waiving that.

THE COURT: Thank you, Mr. Kehne.

The objections are denied. The Court considers the findings that it made was in accordance with the Idaho law.

Mr. Kehne, do you have any further of these motions that you would like to take up at this time?

MR. KEHNE: Judge, I have some more to file today.

[p. 22] THE COURT: Do you have any objections to the filing of these motions, Mr. Bower?

MR. BOWER: No, I have no objection to the Court's looking at those.

THE COURT: Very well. They may be filed at this time. At least the motion and the demand for jury sentencing will be filed. The rest of them are proposed orders, I gather.

Very well. You may proceed, Mr. Kehne, in any manner you wish.

MR. KEHNE: Judge, I would start out – I guess the best place to start is with the motion to vacate this hearing and continue it to a future date.

THE COURT: Let me glance at each motion as we go along. I have read them before, but I want to make sure that I read them again and refresh my memory.

Very well. You may proceed.

MR. KEHNE: If the Court reads the Supreme Court's order as authorizing the Court to do only as it already has done – in other words, read the findings and also read the sentence of death in open court – then I suppose there is no point in me having time to prepare a sentencing review.

I had actual notice of this hearing Tuesday night, and that simply is not time for me to prepare a [p. 23] series of witnesses to come in and try to prove mitigating circumstances surrounding the crime.

I think the Supreme Court's order leaves a little bit to be desired in the amount of direction it gives. On the one

hand it sounds like it empowers the Court only to read the findings and the death sentence in open court and follow the statutes on arraignment for sentence.

On the other hand, the order authorizes the Court to impose any sentence which it feels to be just and appropriate under all the circumstances, which I would suggest gives us the authority to start from Square One and put on evidence and try to convince the Court to impose a sentence other than death.

And if we are to have such hearing, I have to have more notice in advance to get people here in a day and a half.

THE COURT: Thank you, Mr. Kehne.

Mr. Bower, do you have any comments you would like to make in that regard?

MR. BOWER: No.

THE COURT: Very well. I am going to deny the motion. I will state why. The Idaho Supreme Court in my opinion has, by their statements, gone along with all the hearings I have had in regard to sentencing.

[p. 24] I can't see that there is any more required in this particular proceeding other than an argument. I don't intend to let the witnesses all come back and all the presentence people brought in and go back clear through farther than that point before I made these findings.

And I have also been given a deadline, I do note for the record, that I have to have this done. And I might add, this is about the only time I have. I have solid cases that should be heard between now and the deadline.

So I am going to deny the motion to continue, the motion vacating sentencing hearing and reset.

MR. KEHNE: Just to clarify the record so I'm not charged with a waiver that I didn't intend, would the Court's ruling be the same if I secured from the Supreme Court an order extending the deadline?

THE COURT: Oh, yes, I think we ought to get this matter going. I think it's up to the Supreme Court to control this matter. If you get an order, you are welcome to do so, Mr. Kehne, and I will abide by the same.

MR. KEHNE: But as the order reads now, even if the Court had more time, the Court would rule that we are not to start all over again with witnesses?

[p. 25] THE COURT: Well, not without cause. You haven't given me any cause.

Mr. Bower, I will direct you to prepare an appropriate order for the Court's signature denying the motion vacating sentencing hearing and reset.

MR. BOWER: I would like a copy of that. I never got a copy of that particular motion.

MR. KEHNE: Did you get several others I left at your office yesterday?

MR. BOWER: No. Maybe they just haven't got in my file yet.

THE COURT: If you feel it is necessary, I could take a short break and let my clerk give you copies of these matters, Mr. Bower.

MR. BOWER: The only motions I have here are the ones counsel I believe just filed with the Court.

MR. KEHNE: I left them with the receptionist yesterday afternoon.

MR. BOWER: They haven't found their way –

THE COURT: Well, let's take a short recess then and then we will take up as soon as you locate these motions, Mr. Bower.

And if you need the same, my clerk will be glad to furnish the same.

THE BAILIFF: All rise, please.

[p. 26] (Recess.)

THE COURT: Thank you. I will again take up the case of the State of Idaho, Plaintiff, versus Thomas Creech, case number 10252.

Mr. Bower, before we start, have you received copies of these various motions?

MR. BOWER: I have, Your Honor. I found the spot where they were in my office and I have them in my possession.

THE COURT: Very well, then. Mr. Kehne, you may proceed.

MR. KEHNE: I think logically the next motion in order would be the motion to suspend proceedings and appoint a designated examiner to examine the competence of the defendant and proceed to sentencing.

THE COURT: Very well. You may proceed with your argument.

MR. KEHNE: I would just rely on the representations I made in the motion.

THE COURT: Mr. Bower, do you have any statements you would like to make in regard to that motion?

MR. BOWER: Well, I don't think that this procedure, pursuant to 18-211(1), would be the appropriate procedure under our procedural statutes.

I believe if there were a sentencing date, if [p. 27] this case were remitted back to this Court, then there is a procedure for counsel to explore this particular problem, if it does exist.

But I think under the current stated case where, as soon as the Court makes a ruling today having basically done what the Supreme Court has requested, these matters will go back to the Supreme Court.

And until such time as there is a sentencing date set by this Court on remittitur from the Supreme Court, these matters are moot.

THE COURT: Mr. Kehne, do you have any comments you would like to make in response?

MR. KEHNE: Your honor, I would submit that the statute being relied on is appropriate as long as there are judicial proceedings against the defendant.

The other procedure is to prevent an insane man from actually being executed. And I don't think we are to that step.

THE COURT: I am included to agree with the state. Motion denied. I will direct the state to prepare an appropriate order for the Court's signature.

MR. KEHNE: The next motion I would like to take up is – it is not exactly a motion. It's just a demand for jury participation in sentencing. And I will rely on that. I just filed that to make sure we didn't have an [p. 28] unintentional waiver of our right to jury sentencing.

THE COURT: Mr. Bower, do you have any comments in regard to that motion? Or demand, I should say.

MR. BOWER: No, judge. I think the record of waiver is clear in this case.

THE COURT: I will deny the demand for jury sentencing, feeling it is the opinion of this Court that the sentencing procedure used by the Court is in accordance with the laws of the State of Idaho.

I will direct the state to prepare an appropriate order for the Court's signature.

MR. KEHNE: By implication, the Court has ruled against the other motions. The other motions are all designed to help us have a more meaningful opportunity to present evidence in mitigation and to present live witnesses which would rebut the findings made by the Court last time in aggravation which were again adopted by the Court today.

Specifically, we would like to dispute the – by presenting live witnesses, we believe we would dispute the finding that the victim was handicapped, that this was an assassination, that there was an intent to kill, that it was a

calculated act, that the defendant exhibited utter disregard.

And in order to gather all that information [p. 29] together, we would need the institutional jackets, or at least access to the institutional jackets, of both defendant and victim. And that is my motion to compel.

And we would need the current whereabouts, if it is known by the institution, of four people listed in the motion for disclosure who were in the penitentiary and were witnesses to the actual crime and knew the background leading up to the crime but who are not longer in the institution.

I believe they are all on parole. Maybe they toughed out their sentences and the institution doesn't know where they are. But Louis Segalson, Chuck Isaacson, et cetera, listed on that motion would have been material witnesses and I think if they are on parole, the state would know where they are. And that is our motion for disclosure, their whereabouts.

Motion and order for a list of names and current whereabouts of inmates residing in 9 house, C Tier when Jensen first arrived.

We are seeking that because we don't have that information available to us and is kept in records at the institution and those people would have important evidence concerning the character of the victim David Jensen which would help us establish our mitigation.

[p. 30] And our motion for inspection was to help us gather evidence for a hearing in mitigation. Specifically, we moved the Court to order the Board of Corrections to

permit me and one witness to inspect and photograph the scene of the crime in preparation of the sentencing hearing.

And the last motion I have is for release or production of a copy of the presentence report. That is because I do not have one in my possession. Mr. Chreech himself took mine and he sent it to relatives somewhere. And I don't have one today as I come to this hearing.

THE COURT: Mr. Bower, do you have any – let's start out with, probably to make it easy, do you have any objections to giving the defense counsel a copy of the – signing the order for release of the presentence report?

MR. BOWER: None.

THE COURT: Very well. At this time then I will grant that particular order and I will sign the proposed order if you have no objections to its general form.

MR. BOWER: No. I think he is entitled to have in his file a copy of that presentence report, within the limits of the Supreme Court Rule 37(g).

THE COURT: Very well. I will sign this order at this time that the presentence investigation report in the above-entitled matter be released to defense counsel.

[p. 31] Now, do you have any comments in regard to the other motions that you would like to place on the record?

MR. BOWER: In light of the Court's ruling on counsel's other motion, I think these motions are moot.

THE COURT: Anything further, Mr. Kehne?

MR. KEHNE: No, Your Honor.

THE COURT: Very well. I am of the opinion that the prior comments of the Court covers these motions and I am going to deny all of them and I will direct the state to prepare an appropriate order in those regards.

Are there any further matters we should take up before carrying out the order of the Supreme Court?

MR. BOWER: Only, Your Honor, I assume the Court will be ordering the defendant back into the custody of the Idaho State Board of Corrections. If such is the case, I would ask the court for 24 hours to make that transfer.

MR. KEHNE: Your Honor, Mr. Creech and I have something we would like to discuss before we proceed with the actual imposition of sentencing.

THE COURT: You would like a short recess?

MR. KEHNE: Yes.

THE COURT: Very well. We will take a short recess then.

[p. 32] THE BAILIFF: All rise, please.

(Recess.)

THE COURT: Thank you. Again I will take up the case of the State of Idaho, Plaintiff, versus Thomas Creech, case number 10252.

Mr. Kehne, you asked for a recess. Is there anything further you want to take up before the sentencing?

MR. KEHNE: I would like to clarify the record, Your Honor. During the recess we had filed a motion with the Supreme Court, asking for an order directing this Court to grant us an opportunity, a meaningful opportunity, to present evidence in mitigation.

And in support of that request, I would like to clarify my offer of proof. I would like the opportunity to present live witnesses to rebut some of the facts found in aggravation concerning the character and handicapped nature of the victim. Also, the defendant's character. Also, the defendant's regard for life.

And we would like to repeat the testimony of Doctor John Stoner concerning the defendant's lack of ability to conform his conduct to the requirements of the law of self-defense to the extent he did exceed the right of self-defense and, probably most importantly, we would [p. 33] like the opportunity to present evidence both from Doctor Stoner and from the spiritual advisers of the defendant and other people who have been around him to describe the changes in the defendant's character that have occurred since the time the last sentence was imposed.

The Supreme Court Clerk took our motion upstairs and it is under advisement by the Supreme Court. But in the meantime, there is no stay ordered that we are aware of. So I guess the Court isn't violating any orders by proceeding ahead. But we would for the record object to proceeding ahead, at least until they decide the motion.

THE COURT: The motion is denied.

The record will then show that the defendant, Mr. Creech, is personally present in court, is represented by his attorney, Mr. Kehne, who is also present. The state of Idaho is represented by Mr. Greg Bower, Prosecuting Attorney of Ada County, Idaho.

Heretofore, Mr. Creech, this Court did inform you that the prosecuting attorney of this county had filed in this court an Information against you charging you with a certain crime or crimes against the laws of the State of Idaho.

[p. 34] At that time and throughout these entire proceedings, your attorney has been present and acting in your behalf. Upon inquiry you informed the Court that Thomas Creech is your true name.

A copy of the Information was given to you and you through your attorney waived its reading to you.

You were advised that you were entitled to a reasonable time within which to consider and enter your plea and also that you could waive that time.

Thereafter, you answered that you were guilty of the offense of First Degree Murder charged against you. You were fully advised of the consequences of your plea of guilty and of your various rights if you plead not guilty.

After considerable questioning, this Court determined that your plea was freely, voluntarily and constitutionally entered and the Court accepted your plea of guilty.

A presentence report was ordered. The report was returned and a copy was furnished to your attorney.

And of course, we have gone through long hearings in regard to this matter.

Today is the day then fixed as the time for pronouncement of judgment and sentence against you in accordance with the remand directions of the Idaho [p. 35] Supreme Court.

And in that regard, Mr. Kehne, do you have anything you would like to say on behalf of your client?

MR. KEHNE: Your Honor, we would, as part of this arraignment for sentence, inform the Court that there is legal cause why judgment should not be pronounced against the defendant;

First of all, because the statute under which he is prosecuted is unconstitutional by shifting the burden of persuasion on the death sentence to the defendant by saying unless mitigation outweighs statutory aggravation, then the sentence shall be death. That is unconstitutional;

By failing to provide for jury participation in the sentencing process, as we have outlined in our demand earlier today;

By having in it the unconstitutional aggravating factors of the propensity to commit murder which will probably constitute a continuing threat to society;

By having the unconstitutional aggravating factor of utter disregard for life, which is vague and overbroad and fails to channel discretion and applies to virtually every single First Degree Murder;

And the fact that there is lack of competent [p. 36] proof adduced by live witnesses subject to cross examination of any circumstances in aggravation.

Also, we would submit that it was an abuse of this Court's discretion to accept the defendant's guilty plea over the objection of his counsel at a time when he was obviously suicidal for a case that would probably merit the death penalty.

We would also submit that there is no factual basis for finding the defendant guilty of Murder in the First Degree, nor is there any factual basis to support the guilty plea in this case;

And that the Court has specifically found that David Jensen without provocation attacked Tom Creech before his death. That alone, the fact that he was initially justified in defense himself against this deadly-force attack, makes the crime guilty of manslaughter rather than any degree of murder.

THE COURT: All these motions are denied.

Do you have any other statements you would like to make on behalf of your client?

MR. KEHNE: No, Your Honor.

THE COURT: Mr. Bower, do you have anything that you would like to say on behalf of the State of Idaho?

MR. BOWER: No, Judge.

THE COURT: Very well. There being nothing [p. 37] further to bring to the attention of the Court, again for the record, I will affirm my findings heretofore

entered and I will order, adjudge and decree that the defendant, Thomas Eugene Creech, is guilty of the crime of Murder in the First Degree, 18-401 and 18-403 of the Idaho Code;

And that he be sentenced on this charge to be punished by death by the Idaho State Board of Correction on April 29th, 1983 at 9 o'clock a.m. in the manner prescribed by law.

And the defendant is remanded to the Idaho State Board of Corrections until his sentence is executed. And I will give the sheriff 24 hours to remove him from the same.

MR. KEHNE: Your Honor, we would ask the Court to order that the defendant be allowed to remain with the sheriff, if that is agreeable to all parties.

My understanding is, the warden doesn't object to that. I have talked to sheriff Palmer today and he doesn't object to that, he doesn't mind that.

We would request that he be allowed to stay there. I believe it is in accordance with he law. If the Board of Corrections doesn't object to it, then my understanding is, they have changed their position since the change of management over there and that it is okay with them.

[p. 38] THE COURT: Mr. Bower, do you have any comments you would like to make in that regard?

MR. BOWER: We heard of nothing from the warden. If what counsel says is true, the sheriff's position is he will accept any lawful order of this Court.

THE COURT: Well, I have never had any objections, Mr. Creech, to allowing you to remain in the Ada County Jail. It's just the statute's rule otherwise and I gather the Board of Correction can make any appropriate motion they wish.

And so I will order that the defendant may remain in the Ada County Jail until his sentence is to be executed.

Is there anything further that should be brought to the attention of this Court?

MR. KEHNE: Judge, I would like to say one thing to make the record unmistakably clear. When the Court gave me the opportunity to argue anything further and by my saying that I have nothing else to present, I meant of course only argument. And I did not intend to waive or desire to produce mitigating evidence as I stated before.

THE COURT: I think the record would certainly note that. At least I understood it in that manner, Mr. Kehne.

Anything further?

[p. 39] MR. BOWER: Does the Court desire preparation of the death warrant with respect to sentence?

THE COURT: Yes. I will direct you to do so. And did you get that date then?

MR. BOWER: I did, Your Honor.

THE COURT: Very well. Then it is so ordered. Court is in recess.

(The matter concluded at 10:50 a.m.)

[p. 40] REPORTER'S CERTIFICATE

I, DIANNE E. CROMWELL, Official Court Reporter of the Fourth Judicial District, County of Ada, State of Idaho, hereby certify:

That I am the person who took the proceedings had in the above-entitled action in machine shorthand and thereafter the same was reduced into typewriting under my direct supervision; and

That the foregoing Reporter's Transcript contains a full, true and accurate record of the proceedings had in the above and foregoing cause, which was heard at Boise, Idaho.

IN WITNESS WHEREOF, I have hereunto set my hand this 31st day of March, 1983.

/s/ Dianne E. Cromwell
DIANNE E. CROMWELL,
Official Court Reporter

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

THOMAS E. CREECH, Petitioner, vs. A. J. ARAVE, Warden, Idaho State Penitentiary, and AL MURPHY, Director, Idaho State Board of Corrections, Respondents, and JIM JONES, Attorney General of the State of Idaho, Additional Respondent.	CIVIL CASE NO.___

PETITION FOR WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY

TO: The Honorable ___, Judge of the District Court for the District of Idaho:

1. The name and location of the court which entered the judgment of conviction under attack are:

A. The Fourth Judicial District Court of the State of Idaho, in and for Ada County.

B. Boise, Ada County, Idaho.

2. The date of the judgment of conviction is January 25, 1982. While Petitioner's appeal was pending, the death sentence passed down January 25, 1982 was vacated and the State Supreme Court ordered resentencing. Petitioner was resentenced to death on March 17, 1983.

3. The sentence is that Petitioner, Thomas Creech, be put to death by firing squad or by intravenous injection in the discretion of the Idaho State Board of Corrections.

4. The nature of the offense involved is that Thomas Creech was charged with murder in the first degree in violation of Sections 4001, 4002, and 4003(c) and (e), of Title 18 of the Idaho Code, in that he allegedly did kill one David Jensen with malice aforethought when both Tom Creech and David Jensen were inmates of the Idaho State Correctional Institute and while Tom Creech was serving a life sentence for murder.

5. Petitioner, Thomas Creech, originally pled not guilty, but changed his plea to guilty on August 28, 1981.

6. There was no trial of the issues of guilt or innocence, and the trial of aggravating and mitigating circumstances of the sentence was had before the court sitting without a jury.

7. Petitioner, Thomas Creech, testified at the trial of the issue of sentence.

8. Petitioner, Thomas Creech, appealed his conviction and death sentence.

9. The facts of Petitioner, Thomas Creech's, appeal are as follows:

A. The Supreme Court of the State of Idaho, by order dated the 24th day of February, 1983, retained jurisdiction of Petitioner's appeal, but vacated the Petitioner's death sentence and ordered resentencing to occur before April 4, 1983. Resentencing occurred March 17, 1983 at the trial court level. The Supreme Court of the State of Idaho affirmed the judgment and sentence of the trial court on May 23, 1983 in *State v. Thomas Eugene Creech*, 105 Idaho 326 (Justices Huntley and Bistline filed dissenting opinions starting 105 Idaho at 375).

B. The Supreme Court of the State of Idaho denied Petitioner Thomas Creech's Petition for Rehearing on September 21, 1983.

C. The Supreme Court of the United States denied Petitioner Thomas Creech's Petition for Writ of Certiorari on February 21, 1984, ___ U.S. ___, 104 S.Ct. 1327 (Marshall and Brennan, dissenting).

10. Other than the appeal described in Paragraphs 8 and 9 above, the only petitions, applications, motions or proceedings filed or maintained by Thomas Creech with respect to the judgment of January 25, 1982 and the resentencing which occurred March 17, 1983 of the Fourth Judicial District Court of the State of Idaho, are those described in Paragraph 11 below.

11. A. On May 19, 1983, a motion to arrest judgment and to withdraw guilty plea was filed by counsel on behalf of Petitioner Thomas Creech. On June 24, 1983, Petitioner's motion to withdraw his guilty plea was denied, as was his

request for a hearing on his motion to withdraw guilty plea.

B. Petitioner Thomas Creech appealed the denial of a hearing on his motion to withdraw guilty plea and the denial of his motion to withdraw guilty plea on June 24, 1983. That appeal was subsequently dismissed by the Idaho Supreme Court.

C. Petitioner Thomas Creech renewed his motion to withdraw guilty plea and that motion and others were set for hearing commencing February 21, 1984. The district court denied Petitioner's motion to withdraw his guilty plea by order dated March 6, 1984. In spite of Petitioner's specific request for findings of fact and conclusions of law, none were issued by the district court in support of its order denying the motion to withdraw guilty plea. (A copy of that order is appended as an exhibit.) Petitioner Thomas Creech appealed the denial of his motion to withdraw guilty plea and the Idaho Supreme Court affirmed in an opinion reported at ___ Idaho ___, Appeal #15475 rehearing denied December 31, 1985.

D. The district court issued a death warrant on January 10, 1986, ordering Petitioner's execution February 3, 1986.

12 Petitioner Thomas Creech's conviction and sentence were obtained and imposed in violation of his rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States for each of the reasons to be set forth fully below.

INTRODUCTION

13. Petitioner Thomas Creech specifies each of the grounds on which he relies in support of his contention that his conviction and sentence are illegal under the United States Constitution, and briefly summarizes the facts in support of his contentions. This description is not intended to be final or exhaustive. Petitioner requests the opportunity for more exhaustive briefing, further evidentiary hearing, and further discovery in Federal District Court.

INTRODUCTORY FACTS

14. At the time of the offense, both Mr. Creech and the victim David Jensen were inmates of the maximum security tier of the Idaho State Correctional Institution. (P.H. Tr., P. 34, L. 14, 21-22) On that tier Mr. Creech was janitor (P.H. Tr., p. 48, L. 13-17), which enabled him to stay out of his cell more than the other inmates. Although Mr. Creech gave more than one version of the events leading up to Mr. Jensen's death (*see* testimony of E.C. "Chuck" Palmer, P.H. Tr. p. 71-90) the version most consistent with Mr. Creech's psychological profile (Tr. Vol. II, p. 221, L. 11-24; p. 218-219, L. 10-13) and found as fact by the sentencing court, is that the violence started with the unprovoked attack on Mr. Creech by the victim, Jensen. "That the Defendant did not instigate the fight with the victim, but the victim, without provocation, attacked him. He was inititally justified in protecting himself." (R. Idaho Supreme Court #14480, p. 56, Ls. 10-13.)

15. On the day of his death, Mr. Jensen made two attacks on Mr. Creech. In the first he attacked while

armed with a battery-filled sock. Mr. Creech disarmed Jensen. Jensen later attacked again, this time with a home-made knife composed of a razor blade and a toothbrush. (Tr. Vol. II. p. 218, L. 11-25.) This attack by Jensen cost him his life. In the course of defending himself, Mr. Creech hit Jensen with the battery-filled sock Petitioner had taken from Jensen earlier. There is no reason to believe Mr. Creech knew it beforehand, but a large portion of Jensen's skull had been replaced with a plastic known as cranioplasty material which is much more subject to fracture than is human bone. (P.H. Tr., p. 22, L. 11-24.) In fact, the force of Mr. Creech's blows may well not have caused death in any individual with a normal skull. (P.H. Tr., p. 29, L. 17; p. 30, L. 22.)

16. While the district court found that Mr. Creech was initially justified in defending himself (R. p. 56, L. 10-13), the court also found that his response "went well beyond self-defense". (R. p. 56, L. 20-17.) According to the testimony of psychologist Dr. John Stoner, during the course of his defense against Jensen's attack, Mr. Creech lost both the capacity to appreciate the wrongfulness of his conduct and to conform his conduct to the requirements of the law. (Tr. Vol. II, p. 219, L. 6-25.) The district court found the Petitioner's response to Jensen's attack evidenced "an excessive, violate rage" (R. p. 56, L. 23). The state offered the testimony of Dr. F. Lamarr Heyrend at sentencing. Dr. Heyrend opined that Petitioner was sane when he evaluated Petitioner years before and sane the day of the hearing, but offered no testimony to contradict Dr. Stoner's opinion of Petitioner's lack of capacity at time of the acts charged. (Tr. Vol. II, P. 119-42.)

GROUNDS OF CONSTITUTIONAL INVALIDITY OF PETITIONER'S CONVICTION AND SENTENCE

A. The invalidity of Petitioner's guilty plea under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and the need for discovery and an evidentiary hearing in federal court.

17. The conviction and death penalty in this case rest upon Petitioner's plea of guilty entered August 28, 1981 over the objection of his counsel. In any case the constitutional requirements of a valid guilty plea are that it be knowing, intelligent, voluntary, and entered with the effective assistance of counsel.

18. Petitioner's guilty plea meets none of these requirements. Petitioner's guilty plea ultimately resulted in his death sentence. The United States Supreme Court has repeatedly said there is a special requirement for greater reliability and procedural exactitude in cases which result in capital sentences. See, e.g., *Eddings v. Oklahoma*, 102 U.S. at 872 (1982); *Beck v. Alabama*, 447 U.S. 625, 637-38 (1980); *Gardner v. Florida*, 430 U.S. 349, 557-59 (1977), *Id.* at 363 (White, Justice concurring); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

19. At the time Petitioner entered this particular guilty plea, he did not understand the nature and elements of the offense charged. Acceptance of the guilty plea under this circumstance and the conviction entered thereon, violate the Fifth and Fourteenth Amendments to the United States Constitution. Petitioner further did not understand he had any possible defenses, and at the time of his guilty plea did not knowingly intend to waive any defenses. It later developed he had two defenses: A

required element, malice, was negated by the sudden quarrel instigated by the victim without provocation; and, at the time and to the extent Petitioner exceeded the lawful bounds of self-defense, he was without capacity to conform his conduct to the requirements of law due to mental disease or defect. A conviction based on such a plea is invalid and violative of the Fifth and Fourteenth Amendments to the United States Constitution, and a death penalty based thereon violates the Eighth and Fourteenth Amendments to the United States Constitution.

20. Petitioner's guilty plea was not voluntary in the sense that it was motivated partly by vague but ominous phone calls to family members Petitioner understood to be death threats to be carried out if he went to trial. It was also unvoluntary in that it was motivated partly by a suicidal depression caused by improper medical care furnished to Petitioner by his state custodians.

21. Petitioner was denied the effective assistance of counsel up through the time his guilty plea was entered, in violation of the Sixth and Fourteenth Amendments to the Constitution.

FACTS SUPPORTING PETITIONER'S CLAIM THAT HIS GUILTY PLEA AND RESULTING CONVICTION AND SENTENCE ARE CONSTITUTIONALLY INVALID

22. Petitioner's first state court appearance on these charges occurred during his Magistrate Division arraignment, May 18, 1981, during which he was appointed the Ada County Public Defender's Office. There was a single deputy public defender present to represent Mr. Creech

and all other prisoners appointed counsel that day. That deputy public defender was not the deputy ultimately assigned to represent Petitioner. He spoke with Petitioner about the impossibility of bail and the setting of a preliminary hearing, but refused to talk about the facts of the case or to explain the nature or elements of the crime charged.

23. Petitioner first met the attorney assigned to handle his case at the time set for preliminary hearing, May 29, 1981. Petitioner spoke only briefly with counsel before the commencement of the hearing, but again, not about the elements of the crime or the evidence against Petitioner. Counsel informed Petitioner he would seek to vacate the hearing and continue it to a future date because (1) the state had not complied with discovery and he was not prepared to conduct the hearing, (2) the public defender's office had an unresolved conflict of interest in the case in that the police were attempting to make deals for testimony with other public defender clients. At the time set for commencement of the preliminary hearing, counsel for Petitioner did make that motion to vacate on those grounds, but the motion was denied and Petitioner was forced to his preliminary hearing over his objections made through counsel.

24. At his original district court arraignment, Petitioner Thomas Creech pleaded not guilty and the matter was set for jury trial. However, in a letter dated August 26, 1981, written by Petitioner to the trial judge, Judge Newhouse, delivered to the trial judge with no prior notice to Petitioner's counsel, Petitioner asked that he be brought into court so that he might plead guilty, suicidally expressing the desire that he be executed

promptly. In response to this letter, the trial judge brought Petitioner into court August 28, 1981.

25. During this period, and for several months afterward, Petitioner was intermittently suicidal. Part of the reason Petitioner was depressed during this period is medical. He suffers from endogenous depression and must be maintained on a consistent regimen of antidepressant medication. During the pendency of the proceedings before the trial judge, the state medical personnel at the jail where Petitioner was incarcerated frequently interrupted and changed his antidepressant medication. This inadequate medical care by the state contributed toward Petitioner's desire at the time to plead guilty and to receive the death penalty.

26. Between the time Petitioner's counsel was notified of the trial court's intent to entertain Petitioner's guilty plea and the actual hearing on the guilty plea, Petitioner conferred with his counsel only a brief time outside the courtroom in an unused jury room. At this time, counsel unsuccessfully attempted to convince Petitioner to postpone his guilty plea, but did not have time to explain to Petitioner the elements of the offense or what possible defenses he may be waiving by pleading guilty.

27. At no time before the entry of his guilty plea on August 28, 1981 had Petitioner and counsel discussed elements of the crime. And at the time of his plea, Petitioner did not understand those elements. Specifically, Petitioner did not understand the concept of malice. He mistakenly believed that because he was a life sentence

prisoner and because his alleged victim was also a prisoner, any killing would be murder in the first degree, regardless of mental state.

28. The only discussion of murder and its elements at the time of the plea, consists of: Tr. Idaho Supreme Court #14480, Vol. I, p. 61, L. 11-16:

> "Q: What, as you understand it, does a person have to do to be guilty of the charge of first degree murder? What does it mean to you?
>
> "A: He has to think about doing it.
>
> "Q: And killing someone?
>
> "A: And killing someone."

29. That record woefully falls short of the requirements of due process. Nowhere is there a discussion of malice. One element of murder is malice:

> *"Idaho Code Section 18-4001. Murder Defined.* Murder is the unlawful killing of a human being with malice aforethought . . . "

An intentional killing "upon a sudden quarrel or heat of passion" is not murder, but is voluntary manslaughter.

> *"Idaho Code Section 18-4006. Manslaughter Defined.* Manslaughter is the unlawful killing of a human being, without malice. It is of three kinds: (1) voluntary upon a sudden quarrel or heat of passion. • • • "

30. There is support elsewhere in the record for Petitioner's contention that he is not guilty of first degree murder. In the course of his findings in considering the death penalty, the trial court found as fact "[t]hat the defendant did not instigate the fight with the victim, but

the victim, without provocation, attacked him. He was initially justified in protecting himself." That court went on to find, in aggravation, that the "violent actions of the defendant went well beyond self-defense." These findings of the sentencing court make Petitioner's crime not first degree murder, but rather voluntary manslaughter under Idaho law. A crime for which the death penalty is not authorized.

31. Because of improper medical care and other factors, Petitioner was suicidal and therefore wanted to plead guilty and be sentenced to death promptly. The actions and timing of the trial court caused the ineffective assistance of counsel, in violation of the Sixth and Fourteenth Amendments to the United States Constitution. The court insinuated itself between the then suicidal Petitioner and his counsel, first by entertaining the change of plea with virtually no advance notice to defense counsel, and then by denying counsel any meaningful opportunity to discuss with Petitioner his rights, defenses, and the elements of the crime.

32. The day the trial court entertained Petitioner's plea, Petitioner's counsel objected strenuously to the hearing and the plea and made it clear that the plea was being entered over counsel's objections and without his consent. When these actions failed, Petitioner's counsel moved for a five day continuance in order to consult his client and other attorneys more experienced in death defense work. The trial courts left the decision of the continuance up to the then obviously suicidal Petitioner, who preferred to go ahead with his guilty plea on that day. The motion for continuance was denied. As of this

point in the process, the trial court was allowing Petitioner to represent himself.

33. There is a constitutional right to self representation. *Faretta v. California*, 422 U.S. 806. That right is not absolute, however. The facts in *Faretta* demonstrate the kind of procedure which should be followed before allowing a defendant to represent himself. The *Faretta* inquiry requires a court to warn the defendant of the perils of self-representation and to ascertain on the record whether the defendant has sufficient knowledge, skill and understanding to represent himself consistent with the due process requirements of the Fifth and Fourteenth Amendments. *Faretta*, 422 U.S. 807-08 (1975).

34. It is particularly important to conduct a *Faretta* inquiry in capital cases where the capital defendant is openly, obviously and publicly suicidal. There is a grave threat to the integrity of judicial process when the basis for a capital defendant's conviction is his guilty plea entered while he is obviously suicidal. This is well demonstrated in Petitioner's case. Based on the sentencing court's findings, Petitioner is guilty only of a non-capital offense, manslaughter, as discussed above. He may not be guilty of any offense resulting from this homicide, as shown below.

35. At the time Petitioner was allowed to plead guilty over the objection of his counsel, counsel was having Petitioner evaluated by a psychologist and those evaluations were not yet completed. Ultimately, those evaluations resulted in the psychologist's opinion that at the time he exceeded the lawful bounds of self-defense, Petitioner's actions resulted from an autonomous, self-

perpetuating rage, and that at the time of those otherwise illegal actions, Petitioner was unable to appreciate the wrongfulness [of] his conduct, or to conform it to the requirements of law, due to mental disease or defect.[1] This evidence, if believed, would require a jury to acquit Petitioner of the offense with which he was charged, and of all lesser included offenses. (The district judge had actual notice that psychological examinations were being conducted. Tr. #13380, p. 43, ls. 10-16.)

36. Petitioner did not knowingly waive either defense – reduction to manslaughter from lack of malice or his insanity at the time of his acts – when he was allowed to plead guilty over his counsel's objection.

37. The district court allowed Petitioner to enter his uncounseled guilty plea because of a misapprehension about the law: There is no right to plead guilty to a capital offense. Under all these circumstances, it was error for the court to entertain Petitioner's request to change his plea. The public's interest in maintaining the integrity of its judicial system is too great to countenance death sentences predicated on the guilty pleas of suicidal capital defendants who are allowed to plead guilty over objection of defense counsel and who do not appreciate the elements of the charges or their possible defenses.

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[1] Idaho has since abrogated the defense of insanity. At the time of the offense charged against Petitioner, insanity was a viable defense in this state. See Idaho Code Section 18-207: "*Mental Illness as Defense.* 1. A person is not responsible for criminal conduct if at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law."

38. Petitioner's family received vague but ominous threats which Petitioner and his family perceived to be contingent upon whether Petitioner asserted his rights to a trial. Petitioner believed these anonymous contacts were inspired by those who would be injured by a public trial involving, as this necessarily would, reports of the unseemly happenings on a maximum security tier and the events leading up to alleged victim, David Jensen's death – including how Jensen got the deadly instruments he used on his two attacks on Petitioner the day Jensen died. These threats prevent Petitioner's guilty plea from being voluntary.

39. Another circumstance undermining voluntariness of the guilty plea is Petitioner's depression illness. Eudogenous depression sickness is a long-term ailment, but its symptoms – depression, malaise, indifference, self-destructiveness and suicidal ideation – can be controlled by proper medication. Petitioner had been diagnosed as suffering from depression sickness and had been on anti-depressant medication.

40. The medications which are used to control depression do not work immediately. Depending on the individual patient and the medication, they are not effective for up to more than twenty days of continuous administration. This waiting period of ineffectiveness does not overlap perfectly among the various types of antidepressants prescribed. Taking one medicine for a week will not necessarily shorten the waiting time of ineffectiveness of a second medication by one week.

41. During the period before and after his guilty plea Petitioner's medication was being switched from

time to time and he went without any antidepressants at all for several days at a time. Petitioner believes the predictable result of this improper medical care is the suicidal depression he suffered, expressing its symptoms in his wish to plead guilty and be sentenced to death, in his feelings his family would be better off with him dead (even if they weren't being threatened) and in his unreceptiveness to those who wished to help him save himself.

THE EFFECTS OF DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL ON THE VALIDITY UNDER THE UNITED STATES CONSTITUTION OF PETITIONER'S GUILTY PLEA

42. There are several reasons why Petitioner had not been adequately counseled up until the date he was allowed to plead guilty over the request of his counsel for more time to confide in his client. One is that there was virtually no advance notice that the court would entertain a guilty plea, thus making it impossible for counsel to have a meaningful opportunity to talk to Petitioner before the plea. Another is that the deputy public defender assigned to represent Petitioner was pressed by other cases during the pendency of Petitioner's case up through August 28th, when Petitioner was allowed to plead guilty.

43. Petitioner's counsel actually went through jury trials on one robbery (*State v. Triggs*, commencing July 21, 1981), one arson (*State v. Montoya*, commencing July 28, 1981), one assault with intent to commit murder (*State v. Manchester*, commencing August 20, 1981 and lasting over

one week), and he prepared two other first degree murder cases for trial. (*State v. Parrott*, which was settled shortly before trial, and *State v. Sivak*, another capital case, which actually was tried, commencing September 14, 1981).

44. Up until the time of the plea, Petitioner and his assigned counsel had very little contact. The effect of the district court's denial of the continuance before entertaining the plea was that the plea was uncounseled, unknowing, and unintelligent, and in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

45. Petitioner did not understand the elements of murder. He did not recognize that he had the defense (shown in the sentencing court's own findings) of heat of passion and sudden quarrel which negate malice and reduce the crime to manslaughter. Counsel had not yet developed the defense of insanity later shown in the uncontradicted testimony of Dr. John Stoner at the sentencing hearing.

PETITIONER WAS NEVER GIVEN A FULL AND FAIR HEARING IN STATE COURT TO ATTACK HIS GUILTY PLEA

46. After his direct appeal, Petitioner filed a post conviction motion to arrest judgment and to withdraw his guilty plea. He was not provided a full and fair hearing on his claims in state court in two respects. First, he was not given adequate time to prepare for the hearing or to conduct discovery, and he was denied expert assistance. Second, the state courts refused to enter any findings of

fact or conclusions of law in response to Petitioner's many challenges and extensive evidence.

INADEQUATE PREPARATION TIME

47. Immediately following remand of the case, the state district judge issued an order, apparently on the court's own motion, which did away with the statute of limitations for post conviction relief actions and the law of limitations of actions of the state habeas corpus remedy. The order, dated January 24, 1984, set February 21, 1984 as the date to commence the last of all hearings ever to be held in the case in Idaho district court. The order specifically provided that any matter not filed by February 6, 1984 would be deemed waived. Petitioner objected to that order and informed the district court that he would not have sufficient time to consider which issues to raise or to prepare for a hearing. He was given no relief from the the [sic] effect of that order.

48. Petitioner believes the lack of preparation prevented him from discovering and interviewing the eyewitnesses to the alleged crime, discovering their current whereabouts and the contents of their institutional jackets and results of interviews with them. Petitioner believes that undertaking these basic actions in preparation will enable him to establish that Jensen did, in fact, twice try to kill Petitioner the day he (Jensen) died, that Petitioner is not guilty of a capital offense, and that someone at the penitentiary was responsible for the vague but threatening phone calls his mother received which contributed to his desire to plead guilty.

49. Petitioner believes the lack of preparation prevented him from developing a psychiatric defense fully. All he was able to do in the time allowed was reintroduce the testimony given at his sentencing trial. Thirty days is simply not an adequate time to produce a solid psychiatric defense.

50. The lack of preparation time and expert assistance also prevented Petitioner from developing an adequate record about his inadequate medical care and how it influenced him to plead guilty. Petitioner believes that if given adequate time and expert assistance he can establish that he has endogenous depression sickness which requires a steady, daily treatment with antidepressant medication. Petitioner believes that he can establish, given time, assistance and opportunity, that the care given him by his state custodians was medically inadequate and and [sic] that the predictable result of such mistreatment is a suicidal "bent for self destruction" (*see*, the dissenting opinions of Justices Huntley and Bistline in Petitioner's direct appeal in state supreme court) and unreceptiveness to those, such as his lawyer, who wished to help him.

ABSENCE OF ANY FINDINGS OF FACT OR CONCLUSIONS OF LAW.

51. By reintroducing testimony from earlier parts of the proceedings and presenting live testimony at the hearing Petitioner introduced evidence on each of his many factual allegations attacking his guilty plea. The state trial judge denied the post conviction motions with

no findings of fact or conclusions of law, in spite of Petitioner's explicit request for them.

52. Petitioner submits that the absence of findings of fact and conclusions of law is inconsistent with the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution, and is inconsistent with the Eighth Amendment requirement of reliability in the determination of who shall receive the death penalty.

53. The lack of findings and conclusions in the record makes impossible a meaningful appellate review in the State supreme court. Without findings or conclusions there is no way for a reviewing court to determine whether the lower court relied on inadmissible evidence in making its findings of fact, whether it abused its discretion in its rulings on credibility or whether it even applied the correct rule of law.

54. In Idaho, the standard for whether a guilty plea may be withdrawn is whether "manifest injustice" has been shown. The meaning of the term "manifest injustice" is unclear in previous Idaho case law. For instance, it is unclear whether a defendant must prove his innocence.

55. It is possible, on this record, that the state district judge denied Petitioner's motion to withdraw the guilty plea because he believes execution of this Petitioner is not manifestly unjust even if he is innocent of the crime with which he was charged and for which he was sentenced. The error was compounded in the State supreme court. That court also refused to enter any findings of fact.

56. The Petitioner is entitled to an evidentiary hearing, briefing and argument in federal court because he was not given the adequate preparation necessary to a full and fair hearing in state court to challenge his guilty plea and because there are no state court findings in this record which are necessary to a full and fair review.

B. Constitutional defects in Idaho death penalty statutory scheme.

1. Idaho's statutory death penalty scheme abridges capital defendants' jury trial rights under the federal Constitution.

57. Petitioner Thomas Creech was denied any jury involvement in the capital sentencing trial. After his guilty plea, but before sentencing, he explicitly demanded a jury trial on aggravating circumstances, and specifically on the trial of the issue of whether or not he had the specific intent to kill or premeditation.

58. Idaho's statutory death penalty scheme provides for no participation by a jury in the sentencing process. The United States Supreme Court recently decided there is no right to jury involvement in the *weighing* process of a capital sentencing trial, i.e. passing the actual sentence. There is no United States Supreme Court case approving Idaho's practice of removing the trial of aggravating circumstances from the province of the jury. This issue is currently pending before the Ninth Circuit en banc. See *Adamson v. Rickett*, 758 F.2d 441 (9th Cir. 1985) rehearing en banc granted, 764 F.2d 1343 (9th Cir. 1985).

59. The crime for which Petitioner Thomas Creech was prosecuted requires neither premeditation nor the

specific intent to kill. It is first degree by virtue of his status as a life sentence prisoner and the status of his alleged victim as a fellow prisoner. However, these circumstances, when coupled with the specific intent to kill, become statutory aggravating circumstances which can elevate the crime from non-capital first degree murder to capital first degree murder. Idaho Code Section 19-2515(f)(7).

60. The existence of a specific intent to kill has traditionally been a jury question. The Idaho statutory scheme has removed that question from the province of the jury and made it solely a matter for the sentencing judge's determination. Removal of this issue from the province of the jury and removal of the trial of the existence of all statutory aggravating circumstances from the province of the jury violates the Sixth and Fourteenth Amendments to the United States Constitution.

2. The Idaho death penalty scheme places the burden of proof (or the risk of non-persuasion) upon defendants, in violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

3. Idaho Code Section 19-2515(b) provides:

> "Where a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the court finds at least one (1) statutory aggravating circumstance. Where the court finds a statutory aggravating circumstance the court *shall* sentence the defendant to death unless the court finds that mitigating circumstances which may

> be presented outweigh the gravity of any aggravating circumstance found and make imposition of death unjust." (Emphasis added.)

This issue of unconstitutional apportionment of the burden of proof is currently being reviewed by the Ninth Circuit Court en banc in *Adamson v. Rickett*, supra.

C. The sentencing hearing was conducted in an unconstitutional manner.

FINDINGS BASED ON UNATTRIBUTED, UNCORROBORATED AND UNRELIABLE HEARSAY

61. The Fifth, Eighth and Fourteenth Amendments to the United States Constitution demand that the trial of aggravating and mitigating circumstances be held upon evidence whose reliability is guaranteed by rules of evidence and cross-examination or, at the least, a meaningful opportunity to rebut.

62. In this case, the voluminous record relied on by the sentencing judge included everything in his files, including letters and other presentence material. The presentence report which was considered (over Petitioner's objection) in the trial of aggravating circumstances contained a great deal of hearsay, much of which is uncorroborated or even unattributed, with no guarantee of reliability. That presentence report even included newspaper articles and editorials about this particular Petitioner. The presentence report was voluminous, more readily measured in inches than in pages. Petitioner had no meaningful opportunity to rebut this evidence, or to know upon which evidence the sentencing court relied in making its findings. This violates the due process clauses

of the Fifth and Fourteenth Amendments and the need for reliability expressed in the Eighth and Fourteenth Amendments to the United States Constitution.

D. The Idaho courts improperly found the statutory aggravating circumstance that Petitioner exhibited the "utter disregard for humam [sic] life".

63. This statutory aggravating circumstance found in Idaho Code Section 19-2515(f)(6) is unconstitutionally vague on its face. It provides "no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Furman v. Georgia*, 408 U.S. at 313 (White, Justice concurring). Before Petitioner's sentencing, the Idaho Supreme Court attempted to narrow that aggravating circumstance in *State v. Osborn*, 102 Idaho 405 (1981), with the limitation that it apply to "acts or circumstances surrounding the crime which exhibit the highest, the most callous disregard for human life, i.e., the cold-blooded, pitiless slayer. Petitioner submits that the "utter disregard" circumstance is still too vague to channel the sentencing authority's discretion adequately.

64. Even if the federal courts rule that the *Osborn* case sufficiently narrows the "utter disregard" statutory aggravating circumstance, the Idaho courts committed constitutional error in applying that circumstance to Petitioner.

65. *Osborn* requires a "cold-blooded slayer" for that aggravating circumstance to apply. The court below, however, found that in the present case, the killing evidenced "an excessive violent rage". "Cold-blooded" connotes lack of emotion and is totally inconsistent with excessive

rage. The *Osborn* definition of Section F(6) (the "utter disregard" circumstance), is also inconsistent with the finding of the sentencing court "[t]hat the defendant did not instigate the fight with the victim, but the victim, without provocation, attacked him. He was initially justified in protecting himself." Petitioner is entitled to have the federal court review and overturn this finding of a statutory aggravating circumstance. In *Godfrey v. Georgia*, 446 U.S. 420 (1980), the United States Supreme Court upheld a statutory aggravating circumstance as previously limited in Georgia court opinions but overruled the Georgia courts in applying the circumstance in that particular case.

E. The sentencing court found and weighed two non-existent statutory aggravating circumstances, in violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

66. The statutory aggravating circumstances found by the sentencing court and complained of here are:

> (A.) The murder was defined as Murder of the First Degree by Section 18-4003, Idaho Code, Subsection (c). The Petitioner was under a sentence for Murder of the First Degree at the time of his actions.
>
> (B.) The murder was one defined as Murder of the First Degree by Section 18-4003, Idaho Code, Subsection (e). The Petitioner committed the murder on a fellow inmate while both were incarcerated in the Idaho State Correctional Institution.

67. Those two circumstances are what elevate Petitioner's crime from murder to first degree murder. Idaho

Code Section 18-4003(c)(e). They are not found in the list of statutory aggravating circumstances in Idaho Code Section 19-2515. The district court erred by not noticing that those circumstances are statutory aggravating circumstances only when coupled with a finding of a specific intent to kill beyond a reasonable doubt. The inclusion of these non-existent statutory aggravating circumstances in the weighing process against mitigating circumstances violates the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

• • •

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he lacked substantial capacity to conform his conduct to the requirements of law due to mental disease or defect. This refusal to consider proffered mitigating evidence violates the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and the doctrine of *Eddings v. Oklahoma*, 102 S.Ct. at 872 (1982).

F. Both Petitioner's sentencing trials were conducted in an unconstitutional manner and his sentence is based upon unreliable, often unattributed hearsay he had no meaningful opportunity to rebut or challenge through cross-examination in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

FACTS SUPPORTING PETITIONER'S CLAIM THAT HIS DEATH SENTENCE IS BSED [SIC] ON EVIDENTIARY RULES AND ON PROCEDURES WHICH VIOLATE THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

68. Petitioner's first sentencing trial was held January 11, 1982. The sentencing court received evidence and

argument but passed no sentence at that time, instead taking the matter under advisement. The court later issued its findings, judgment of conviction, report and imposition of death penalty and death warrant January 25, 1982. Neither Petitioner nor counsel was present because the sentencing judge filed these findings and notified Petitioner by service. Petitioner successfully argued during his direct appeal in state courts that the sentence passed January 25, 1982 was void, for sentencing Petitioner *in abstentia* violated Idaho statutes and criminal rules. (The Idaho supreme court did not reach the constitutional issue.)

69. The state supreme court did not issue an opinon [sic] and remand the case at the time it made that ruling. Instead, the supreme court retained jurisdiction of Petitioner's appeal, vacated Petitioner's death sentence and ordered the sentencing judge to hold a new sentencing hearing.

THE FIRST SENTENCING TRIAL – JANUARY 11, 1982.

70. The sentencing court relied on unreliable information at the first sentencing trial. Over Petitioner's objection, the sentencing judge included in the sentencing record everything that had been submitted to his file, including letters, messages, and a voluminous presentence investigation report containing great amounts of hearsay, much of which was corroborated or even unattributed. It even included several newspaper articles about Petitioner and the circumstances of the crime and a local newspaper editorial about Petitioner personally. The presentence report contained reports of psychologists,

psychiatrists and physicians from Idaho and even from Oregon and Ohio, whom Petitioner had no meaningful opportunity to confront or to cross-examine.

71. This type of material would never be admitted in a trial of guilt or innocence, whether that trial was held before a jury or a court. Supreme Court cases have held that the need for reliability in a capital sentencing trial is no less than for a trial of guilt or innocence. The Supreme Court has recognized that a capital sentencing proceeding at which aggravating circumstances are determined and measured against mitigating circumstances is, for practical and constitutional purposes, a trial. E.g. *Bullington v. Missouri*, 101 S.Ct. 1852 (1981).

72. The danger inherent in relying on sentencing records such as those in Petitioner's case stems from the unreliability of the information. Petitioner has had no meaningful opportunity to cross-examine, challenge or rebut the information in the sentencing record. The sentencing judge gave no indication about which information was being considered or about which was ruled credible and which not and why. Given a presentence investigation that is more easily measured with a ruler or a scale than in number of pages, Petitioner had no meaningful opportunity to rebut the unreliable information therein. Petitioner bases his objections to reliance on informal material at his capital sentencing trial upon his rights to due process, to confront and cross-examine his accusers, to have his sentence determined by reliable information and in accordance with procedures embodied in the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

73. Thomas Creech's challenge to the use of such unreliable information at his sentencing trial is not frivolous. His view places him in the good company of the Eleventh Circuit Court of Appeals and the two dissenting opinions of Justices Huntley and Bistline on Petitioner's direct appeal to the Idaho supreme court.

74. The substantiality of this claim is demonstrated by reviewing the enormous amounts of hearsay, unattributed information, newspaper articles and other information admitted into Petitioner's sentencing trial.

75. Petitioner's claims entitle him to resentencing. A stay is required for a full consideration and contemplation of his claims.

76. The sentencing court's reliance on informal information prejudiced Petitioner's ability to receive a fair sentencing hearing in a way other than those discussed immediately above. Petitioner is entitled to a new sentencing hearing because of the informal evidence even if the federal courts rule that use of such unattributed hearsay in a capital sentencing trial does *not* violate the United States Constitution. This is so because a quirky trap existing in Idaho law at the time of Petitioner's sentencing (but removed to Petitioner's prejudice and surprise in his state appeal) prevented Petitioner from arguing any of the presentence material or other hearsay to rebut the conclusions and arguments of the state based upon that material.

77. At the time of Petitioner's first sentencing, an Idaho statute seemed unambiguously to entitle Petitioner to insist that he be tried only on formal evidence from

witnesses testifying in open court in the sentencing trial of aggravating circumstances.

> "Inquiry into circumstances – Examination of witnesses. – The circumstances must be presented by the testimony of witnesses examined in open court, except that when a witness is so sick or infirm as to be unable to attend, his deposition may be taken by a magistrate of the county, out of court, upon such notice to the adverse party as the court may direct. No affidavit or testimony, or representation of any kind, verbal or written, can be offered to or received by the court, or a judge thereof, in aggravation or mitigation of the punishment, except as provided in this and the preceding section." Idaho Code Section 19-2516.

78. Petitioner relied upon Idaho code Section 19-2516, supra (as well as on the constitutional arguments given above) in his insistence that the sentencing trial be held upon formal evidence only. Even after his arguments were rejected and his objections to hearsay and other information information [sic] were overruled by the sentencing judge, Petitioner was still prevented from arguing that type of evidence by two Idaho cases. If Petitioner wished to preserve his complaint about the lack of formality at his sentencing trial for appeal (and he did, honestly believing the sentencing court was wrong) those two Idaho cases prevented Petitioner from also using this type of evidence as rebuttal and in argument.

79. The two cases, *State v. Coutts*, 101 Idaho 110, 113 (1980); and *State v. Osborn*, 102 Idaho 405 (1981), were the only cases ruling on the effect of Idaho Code Section 19-2516, supra. They held implicitly that Section 19-2516

was valid and effective but not absolute. If a criminal defendant participated in an informal hearing, relying on informal evidence and arguing the same, he waived the protections of the statute and would not be heard to complain of the lack of formality on his appeal.

80. Petitioner was placed between a Scylla and Charybdis of Idaho law: either he introduced and argued informal information (thus losing the opportunity to complain of the informality on appeal) or he refused to participate in the use of informal information, thereby preserving the issue on appeal but severely handicapping his ability to defend himself at the sentencing trial against the information being used by the state and being considered by the sentencing court.

81. Petitioner charted the second course because he honestly believed that existing Idaho law entitled him to a formal hearing under the statute and because he believed (and still believes, as argued above and alleged in his Petition) that the United States Constitution entitles him to be tried only on formal, reliable evidence in the sentencing trial of statutory aggravating circumstances.

82. Petitioner lost his argument in the state supreme court that either the state or federal constitutions or the state statute, Idaho Code Section 19-2516, *supra*, forbids the use of informal information at his capital sentencing trial.[2]

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[2] The Idaho court found an apparent inconsistency between Idaho Code Section 19-2516 and the preceding statute,

(Continued on following page)

83. Apparently settled state law (if not also the United States Constitution) gave Petitioner the right to a formal hearing. When the requested formality was denied, Petitioner was handcuffed in his sentencing hearing by the rule of *Coutts* and *Osborn, supra,* which required Petitioner to avoid referring to or arguing any of the voluminous informal sentencing ecord [sic] if he wished to preserve this issue for appeal. New state law was made in

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(Continued from previous page)

Idaho Code Section 19-2515, which was enacted later, in that Section 19-2515 required the sentencing court to order a presentence report and to hear "all relevant evidence and argument . . . " (Idaho Code Section 19-2515(c)); not just "the testimony of witnesses examined in open court . . . " (Idaho Code Section 19-2516).

Petitioner, relying on well-settled rules of statutory construction that statutes should be read together and interpreted so that no conflict exists whenever possible, had assumed that these two statutes should be interpreted together and that together they mean that:

(1) In all capital cases the judge must order a presentence report;

(2) That report will be used to benefit counsel in preparing for the formal trial of statutory aggravating circumstances and can be used, along with argument of counsel, by the sentencing court in the *weighing* process which occurs only after the trial of statutory aggravating circumstances and only if at least one such statutory aggravating circumstance is found beyond a reasonable doubt; and

(3) The determination of whether one or more statutory aggravating circumstance is present shall only be made upon formal evidence, "the testimony of witnesses examined in open court . . . "

Petitioner's appeal when, to Petitioner's suprise [sic] and prejudice, the Idaho supreme court ruled for the first time that there is no right to a formal capital sentencing trial, even when it is required by a defendant who forgoes a meaningful defense against the informal hearsay material at his sentencing trial in order to preserve the issue as required by the *Coutts* and *Osborn* cases, *supra.*

84. Although Petitioner unambiguously relied on *Coutts* and *Osborn* in both the trial and appellate courts and he explicitly put both the sentencing court and the state supreme court on notice that he felt compelled not to use, discuss or argue informal information, he was not given another sentencing in state courts.

85. Because Petitioner was unfairly handicapped at his sentencing by a then-existing state rule of appellate review, his sentencing trial was neither fair nor consistent with the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The federal courts should order that Petitioner be given a new sentencing trial where he is fairly put on notice of the range and types of information which can be used, so that he also may use and argue that same range of information. This is so even if the federal courts rule that no federal right to demand formal evidence at a capital sentencing trial exists. This, of course, demands a stay of Petitioner's execution.

86. The sentencing court found and weighed two non-existent statutory aggravating circumstances. This claim of Thomas Creech's Petition is neither frivolous nor incredible. It appears on the face of the record (see R. State Supreme Court No. 14480, page 57, Findings C and

D). The district court found two statutory aggravating circumstances in the fact that Petitioner was a life sentence inmate, and that his alleged victim was a fellow inmate. These very circumstances were alleged to elevate his crime to first decree as charged. These two circumstances are not part of the statutory list unless they are found to co-exist with a specific intent to kill, a finding which does not appear in the statutory aggravating circumstance found and listed by the sentencing court. The only way to determine how, or even whether, the sentencing court was influenced by non-existent statutory aggravating circumstances is for Petitioner to be allowed a full hearing on the issue. The state courts glossed over this very serious error, and in so doing failed, Petitioner submits, in their review responsibilities.

87. It may be that the sentencing judge merely committed a clerical error in neglecting to include the words "with a specific intent to kill". On the other hand, it is just as probable that the sentencing judge included two non-existent statutory aggravating circumstances in weighing life and death.

88. The Idaho courts improperly found the statutory aggravating circumstance that Petitioner exhibited the "utter disregard for human life".

89. This statutory aggravating circumstance found in Idaho Code section 19-2515(f) (6) is unconstitutionally vague on its face. It provides "No meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not". *Furman v. Georgia*, 408 U.S. at 313 (White, Justice concurring). Before Petitioner's sentencing, the Idaho Supreme

Court attempted to narrow that aggravating circumstance in *State v. Osborn*, 102 Idaho 405 (1981), with the limitation that it apply to "acts or circumstances surrounding the crime which exhibit the highest, the most callous disregard for human life, i.e., the cold-blooded, pitiless slaver". Petitioner submits that the "utter disregard" circumstance is still too vague to channel the sentencing authority's discretion adequately.

90. Even if the federal courts rule that the *Osborn* case sufficiently narrows the "utter disregard" statutory aggravating circumstance, the Idaho courts committed constitutional error in applying that circumstance to Petitioner.

91. *Osborn* requires a "cold-blooded slayer" for that aggravating circumstance to apply. The court below, however, found that in the present case, the killing evidenced "an excessive violent rage". "Cold-blooded" connotes lack of emotion and is totally inconsistent with excessive rage. The *Osborn* definition of Section (f) (6) (the "utter disregard" circumstance), is also inconsistent with the finding of the sentencing court "[t]hat the defendant did not instigate the fight with the victim, but the victim, without provocation, attacked him. He was initially justified in protecting himself." Petitioner is entitled to have the federal court review and overturn this finding of a statutory aggravating circumstance. In *Godfrey v. Georgia*, 446 U.S. 420 (1980), the United States Supreme Court upheld a statutory aggravating circumstance as previously limited in Georgia court opinions but overruled the Georgia courts in applying the circumstance in that particular case.

THE SECOND SENTENCING TRIAL

92. Petitioner has raised several serious, substantial complaints about the sentencing trial held January 11, 1982. As is demonstrated below, *not one* of those defects was cured by the subsequent retrial of his sentence conducted March 17, 1983. A stay of execution is absolutely essential for a thorough contemplation of these federal claims. There is not sufficient time left before Petitioner's execution date for the federal courts even to sift through the state record (transcripts, clerk records, briefs and opinions) let alone to allow thorough briefing, argument and hearings.

93. As noted above, Petitioner has been given two sentencing hearings. The first death sentence imposed against Petitioner in this case was ruled to be void because it was imposed in writing, from chambers, in the absence of Petitioner and his counsel. The state supreme court retained jurisdiction of Petitioner's appeal while resentencing occurred. The pertinent portions of the state supreme court's order are quoted below:

> "It appearing from the record, without any contention otherwise by the respondent State of Idaho, that contrary to the requirements of I.C. Section 19-2503 and I.C.R. 43(a), the trial judge purported to impose sentence in the absence of defendant and his counsel and without the presence of defendant and his counsel in open court, but rather by means of a written imposition of a sentence of death;
>
> "NOW, THEREFORE, IT IS HEREBY ORDERED that the sentence of death imposed upon the

> defendant in the absence of the defendant and his counsel be and the same hereby is *vacated* and the cause is remanded to the Honorable Robert Newhouse, District Judge of the Fourth Judicial District of the State of Idaho, Ada County, who shall within fourteen (14) days from the date of this Order, in open court and in the presence of defendant and his counsel, enter a judgment of conviction *and impose such sentence upon the defendant Thomas Eugene Creech as to the said District Judge may appear to be just and appropriate. In the event* that said Judge shall impose a sentence of death, a warrant therefor shall issue in accordance with I.C. Section 19-2705." (R. Idaho Surpeme [sic] Court #15000, p. 8-9.) (Emphasis added.)

94. The resentencing was conducted on a bare one and one-half days notice to Petitioner and his counsel. Petitioner strenuously objected and pressed for more time. Petitioner asked for a meaningful opportunity to prepare for sentencing. Petitioner pressed for discovery in the form of:

(1) Access to inmate institutional records of both Petitioner and the alleged victim (R. Idaho Supreme Court #15000, p. 18-19);

(2) Disclosure of the whereabouts (if known) of specified inmate witnesses who had since been released (R. Idaho Supreme Court #15000, p. 21-23);

(3) Disclosure of the names and current whereabouts of other inmates residing in the tier where Petitioner and the victim fought (R. Supreme Court #15000, p. 24-26);

(4) Access for Petitioner's counsel and one witness to the tier where the crime allegedly occurred so that the crime scene could be inspected and photographed (R. Idaho Supreme Court #15000, p. 27);

(5) Access to the Petitioner's presentence report (R. Idaho Supreme Court #15000, p. 28); and

(6) Appointment of a designated examiner to conduct a current psychiatric evaluation of Petitioner.

95. This second sentencing "trial", if it can be called that, resulted in the death sentence under which Petitioner is currently suffering. The first sentence was unambiguously "vacated" by the state supreme court. At the second trial of March 17, 1982, the sentencing judge merely read into the record his findings, conclusions and death sentence which resulted from the first sentencing trial held more than one year before. Petitioner was denied any meaningful opportunity to present witnesses in mitigation. The sentencing judge repeated all the mistakes of the first sentencing complained of in the previous section and reiterated all the same erroneous findings in the second sentencing. In addition, the sentencing court compounded all the constitutional defects of the January 11, 1983 hearing by refusing to give Petitioner adequate preparation time or discovery.

96. As a practical matter, the sentencing court refused to consider *any* mitigating evidence from Petitioner in the second sentencing. In doing so that court violated virtually every constitutional doctrine established about the conduct of capital sentencing trials since *Furman v. Georgia*, 408 U.S. 238 (1972). E.g. *Lockett v. Ohio*, (438 U.S. 536 (1978)) and *Eddings v. Oklahoma*, (102 S.Ct.

869 (1982))stand for the proposition that capital defendants *must* be given the opportunity to present mitigating evidence and to have that evidence considered before sentence is passed. Numerous supreme court opinions have likened the capital sentencing trial to a trial of guilt or innocence and extended the protections of the guilt trial to capital sentencings. See, e.g. *Gardner v. Florida*, 430 U.S. 349 (1977) (forbidding use of undisclosed information); *Bullington v. Missouri*, 101 S.Ct. 1852 (1981) (double jeopardy; the capital sentencing is, for constitutional purposes, a trial); and *Presnell v. Georgia*, 439 U.S. at 16 (1978) (the fundamental principles of procedural fairness apply no less at the penalty phase of a capital case than to the guilt phase).

97. It is inconceivable that the Supreme Court would countenance a retrial of any criminal defendant who had won vacation of his conviction due to errors in the first trial if in the retrial the defendant was prevented from producing any evidence at all, except that already introduced at his first trial. Yet that is exactly what happened to Petitioner at the retrial of his capital sentencing issues. He had no time to summon witnesses, no discovery of relevant information and no adequate time for preparation.

98. Respondents may try to counter these claims by contending that the sentencing court considered the record of the first trial, at which Petitioner was given an adequate opportunity to present mitigation. However, in several respects the first sentencing trial was not adequate, as discussed before in this Petition. Furthermore,

Petitioner actually would have produced more and different evidence at the second trial if he had been given the opportunity.

99. By the second trial, Petitioner had been on death row for more than a year since the first sentencing and had undergone several changes which he had a right to offer in mitigation. He could have shown his value as a human being by showing how he wrote a song for a badly injured, hospitalized young girl. His spiritual advisors could have testified about his growth and increased sensitivity. Petitioner could have had guards testify that he was not being a threat or a management problem. All this evidence *could* not have been produced at the first hearing because it concerned the period since his first sentencing.

100. At the March 17th retrial, Petitioner wished to produce evidence about the crime itself which he had not presented at the first sentencing trial. At the second sentencing Petitioner had the benefit of the sentencing court's findings issued a year before. Some of those findings took Petitioner by surprise. He wished to respond to those findings with evidence but did not receive the opportunity to do so.

101. In summary, the capital sentencing trial of March 17, 1983 (which resulted in Petitioner's current death sentence) repeated all the violations of the United States Constitution which occurred a year before and then compounded those errors by denying Petitioner any meaningful opportunity to prepare and to produce a defense at the second sentencing trial.

PRAYER

Wherefore, Petitioner prays this Court:

1. Issue a Writ of Habeas Corpus to have Petitioner brought before it to the end that he may be discharged from his unconstitutional restraint on these charges and/or be relieved of his unconstitutional sentence of death;

2. Order the Respondent to produce the transcripts in clerk's records from all proceedings in state court, including post conviction motions;

3. Require Respondent to file an answer in which Respondent must specifically admit or deny Petitioner's factual allegations.

4. Review the entire state court record, including transcripts, clerks' records, minute entries, briefs and opinions;

5. Order that Petitioner, who is indigent, may proceed without prepayment of costs or fees;

6. Order discovery on behalf of Petitioner pursuant to Rule 6 of the Rules Governing Section 2254 cases;

7. Appoint experts to assist Petitioner in preparation and presentation of his claims;

8. Conduct a hearing at which argument and proof may be offered concerning the allegations of this petition;

9. Stay Petitioner's execution pending final disposition of this petition; and

10. Grant such further relief as may be just and appropriate.

Respectfully submitted,

ROLF M. KEHNE
WIEBE & KEHNE
102 South 17th Street, Suite 200
Boise, Idaho 83702
Telephone (208) 336-6777

Attorneys for Petitioner

By _____
ROLF M. KEHNE

STATE OF IDAHO,)
: ss.
County of Ada.)

THOMAS CREECH, being first duly sworn, upon oath, according to law, deposes and says:

That he has read the foregoing Petition and that he knows the contents thereof to be true, except as to such matters as are stated upon information and belief, and these he verily believes to be true, and that he believes he is entitled to the relief sought therein.

_____
THOMAS CREECH

SUBSCRIBED and SWORN to before me this ___ day of January, 1986.

_____
Notary Public for Idaho
Residing at Boise, Idaho

JIM JONES
Attorney General
Office of Attorney General
State of Idaho
Statehouse, Room 210
Tel.: (208) 334-2400

LYNN E. THOMAS
Solicitor General

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

THOMAS E. CREECH, Petitioner, vs. A. J. ARAVE, WARDEN, Idaho State Penitentiary, and AL MURPHY, Director, Idaho State Board of Corrections, Respondents, and JIM JONES, Attorney General of the State of Idaho, Additional Respondent.	CIV. NO. 86-1042 ANSWER (Filed Mar. 5, 1986)

The respondent custodial officer answers the Petition for a Writ of Habeas Corpus as follows:

I.

GENERAL RESPONSE TO THE PETITION

1. Petitioner is detained by the State of Idaho pursuant to a judgment of the District Court for the Fourth Judicial District of the State of Idaho filed March 17, 1983, by which the petitioner was sentenced to be put to death pursuant to the law of the State of Idaho, which conviction and sentence were affirmed on appeal to the Supreme Court of the State of Idaho in *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983).

2. Petitioner subsequently moved to withdraw his plea of guilty, which motion was denied by the trial court, and the trial court's order denying the motion to withdraw petitioner's plea was affirmed on appeal by the Supreme Court of the State of Idaho in *State v. Creech*, Idaho S.Ct., No. 15475, June 20, 1985.

3. The District Court of the Fourth Judicial District in and for the State of Idaho set the date of petitioner's execution as February 3, 1986, which action was stayed by order of this court on January 31, 1986.

4. The petition does not state facts pointing to a real possibility of legal error cognizable in the federal courts and should be dismissed summarily.

5. The Petition for a Writ of Habeas Corpus constitutes an abuse of legal process for the following reasons:

a. Petitioner has repeatedly perjured himself, by his own admission, and his factual allegations are wholly unworthy of belief.

b. Petitioner has repeatedly recanted testimony given under oath, including that given at

the time he entered his guilty plea, at which time he stated that his plea was wholly voluntary and that he had intended to kill his victim.

c. Petitioner has attempted to delay his execution by reserving issues to be raised in repetitious litigation, in violation of state law requiring him to raise such issues in state proceedings or forfeit them.

d. Petitioner has repeatedly connived to construct fraudulent justifiable homicide theories, one of which is part of his present claim, being fully aware by virtue of his lengthy experience with the criminal justice system that self-defense, or defense of others, is a defense to a charge of murder.

6. Petitioner has exhausted all available state remedies.

7. Petitioner has procedurally defaulted all legal issues except the constitutional validity of the sentence of death imposed upon him and the wholly state law question of whether he should have been allowed to withdraw his guilty plea by failing to raise such issues in accordance with state law.

8. Because of such procedural defaults, petitioner is not entitled to litigate in a federal habeas corpus proceeding any claim other than the constitutional validity of the sentence imposed upon him.

9. The petition does not state facts pointing to a real possibility of legal error cognizable in the federal courts, and it should be dismissed summarily.

II.

ANSWER TO THE ALLEGATIONS OF THE PETITION

Without waiving petitioner's claim of procedural default, and without conceding that any allegation of the petition states a federally reviewable claim for relief, respondent answers the allegations of the petition as follows:

1. Respondent admits the allegations of paragraphs numbered 1, 5 and 66.

2. Respondent admits the allegations of paragraph 4, except that respondent asserts the allegations of paragraph 4 are factually incomplete.

3. Respondent admits the allegations of paragraph 11 of the petition, except that with respect to paragraph 11(C) respondent denies that the trial court made no findings of fact and conclusions of law with respect to petitioner's motion to withdraw his guilty plea and asserts further that none were required under state law, and the claim raises no federal question.

4. Respondent has no knowledge of the facts asserted in the following numbered paragraphs and therefore denies the same: 22, 23, 43.

5. The following numbered paragraphs are denied: 12, 18, 19, 20, 21, 25, 27, 28, 30, 31, 36, 37, 38, 39, 44, 45, 46, 51, 53, 54, 56, B, B-1, C, 61, 62, D, 63, F, 69, 70, 72, 73, 74, 75, 76, 77, 81, 83, 85, 86, 88, 89, 90, 92, 95, 97, 99, and 101.

6. The following numbered paragraphs are argumentative or assert interpretive versions of events as

though they were "facts," or both, and are denied: 6, 13, 14, 24, 26, and 47.

7. The following numbered paragraphs argumentatively assert factual matters out of context in a misleading manner or are argumentative, or both, and are denied: 16, 17, 24, 32, 48, 49, and 50.

8. The following numbered paragraphs assert or imply incorrect legal arguments and are denied: 33, 34, 35, 52, 55, 57, 58, 59, 60, B, B-2, B-3, 64, 65, 67, 71, 78, 79, 80, 82 and footnote, 84, 87, 91, 94, 96, 98, and 100.

9. The following paragraphs assert incorrect factual arguments and are denied: 40, 41, 42, 65.

10. Paragraph 2 is denied to the extent that it asserts that the State Supreme Court ordered "resentencing" of petitioner.

11. Paragraph 3 is denied to the extent that it asserts that the Board of Corrections has unlimited discretion to choose between a firing squad and intravenous injection as the method of execution.

12. Paragraph 8 is denied to the extent that it asserts that petitioner appealed his conviction.

13. Paragraph 9(A) is denied to the extent that it asserts that the State Supreme Court ordered "resentencing" of the petitioner.

14. Paragraph 15 argumentatively asserts factual matters out of context in a misleading manner and is denied.

15. Paragraph 29 is denied except that respondent admits the excerpted language from the Idaho Penal Code.

16. With respect to paragraph 68, respondent admits that petitioner's sentencing hearing was held January 11, 1982, and that the Idaho Supreme Court, while retaining jurisdiction, ordered the district court to pronounce sentence in the defendant's presence, and denies the remaining argumentative assertions of paragraph 68.

17. With respect to paragraph 93, respondent denies the petitioner has been given two sentencing "hearings" and asserts that the sole purpose of the remand ordered by the supreme court during petitioner's appellate sentence review was to require the trial court to announce sentence in the petitioner's presence and the supreme courts's order had no purpose to create an occasion for a new sentencing hearing. The quotation from the supreme court's order appearing in paragraph 93 is admitted; the argumentative assertions of paragraph 93 are denied.

III.

AVAILABILITY OF TRANSCRIPTS

1. The following transcripts and exhibits are appended hereto:

EXHIBIT A – Vol. I, Idaho Appellate Proceeding #14480.

EXHIBIT B – Vol. II, Idaho Appellate Proceeding #14480.

EXHIBIT C – Vol. I, Idaho Appellate Proceeding #15475.

EXHIBIT D – Vol. II, Idaho Appellate Proceeding #15475.

EXHIBIT E – Creech excerpt, Idaho Appellate Proceeding #12224.

EXHIBIT F – Helby excerpt, Idaho Appellate Proceeding #12224.

EXHIBIT G – Hurst excerpt, Idaho Appellate Proceeding #12224.

EXHIBIT H – Heyrend excerpt, Idaho Appellate Proceeding #12224.

EXHIBIT I – Estes excerpt, Idaho Appellate Proceeding #12224.

EXHIBIT J – Estes excerpt, Idaho Appellate Proceeding #12224.

EXHIBIT K – Treleaven excerpt, Idaho Appellate Proceeding #12224.

EXHIBIT L – Humiston excerpt, Idaho Appellate Proceeding #12224.

EXHIBIT M – Appellent's Brief, Idaho Appellate Proceeding #14480.

EXHIBIT N – Respondent's Brief, Idaho Appellate Proceeding #14480.

EXHIBIT O – Appellant's Brief, Idaho Appellate Proceeding #15114.

EXHIBIT P – Respondent's Brief, Idaho Appellate Proceeding #15114.

EXHIBIT Q – Slip Opinion, *State v. Creech*, #15475.

EXHIBIT R – Appellant's Brief, Idaho Appellate Proceeding #15475.

EXHIBIT S – Respondent's Brief, Idaho Appellate Proceeding #15475.

EXHIBIT T – Brief in Support of Rehearing, #15475.

2. The following additional transcripts and documentary exhibits are not yet available, but respondent estimates that these materials will be available within two weeks time:

a. Additional factual materials to be used to support a motion for summary judgment.

b. Remand hearing, Idaho appellate proceeding 14480.

3. Certified copies of the following are attached hereto:

a. Judgment of conviction filed January 25, 1982.

b. Death Warrant filed January 25, 1982.

c. Report on Imposition of Death Penalty filed January 25, 1982.

d. Findings filed January 25, 1982.

e. Judgment of Conviction filed March 17, 1983.

f. Death Warrant, March 24, 1983.

g. Death Warrant, September 23, 1983.

h. Order for Execution, April 3, 1984.

i. Death Warrant, January 10, 1986.

Respondent prays that the writ be denied, or, if granted, that all relief be denied.

DATED this 5 day of March, 1986.

/s/ Lynn E. Thomas
LYNN E. THOMAS
Solicitor General
State of Idaho

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 5 day of March, 1986, I served a true and correct copy of the foregoing ANSWER by placing a copy thereof in the United States mail, postage prepaid, addressed to Rolf M. Kehne, Esq., 102 South 17th Street, Suite 200, Boise, Idaho 83702.

/s/ Lynn E. Thomas
Lynn E. Thomas

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

THOMAS E. CREECH, Petitioner, v. A. J. ARAVE, Warden, Idaho State Penitentiary, and AL MURPHY, Director, Idaho State Board of Corrections, Respondents, and JIM JONES, Attorney General of the State of Idaho, Additional Respondent.	)	CASE NO. 86-1042 MEMORANDUM OPINION AND ORDER (Filed Jan. 31, 1986)

I. INTRODUCTION

On January 29, 1986, Petitioner Thomas E. Creech submitted an application for stay of execution of his sentence of death, and supporting memorandum in conjunction with a petition for writ of habeas corpus. Creech is scheduled to be executed on February 3, 1986.

The following review of the prior state court proceedings is taken from the petition. On January 25, 1982, a judgment of conviction was entered against Creech by the Idaho Fourth Judicial District Court sentencing Creech to death for the first degree murder of David Jensen. At the time of the murder Creech was serving a

life sentence of imprisonment in the Idaho State Correctional Institution. Creech had originally pled not guilty to the charge, but changed his plea to guilty on August 28, 1981. There was no trial on the issue of guilt and the trial of aggravating and mitigating circumstances (for sentencing) was held before the court sitting without a jury.

Creech appealed his conviction and death sentence. On February 24, 1983, the Idaho Supreme Court, retaining jurisdiction of Creech's appeal, vacated his death sentence and ordered resentencing. The trial court resentenced Creech to death on March 17, 1983. On May 23, 1983, the Idaho Supreme Court affirmed the judgment and sentence in a three-two decision. *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983). The Idaho Supreme Court denied Creech's petition for rehearing. The United States Supreme Court subsequently denied Creech's petition for writ of certiorari. *Creech v. Idaho*, ___ U.S. ___, 79 L.Ed.2d 722, 104 S.Ct. 1327 (1984).

Creech also moved to arrest judgment and to withdraw his guilty plea on May 19, 1983. On June 24, 1983, this motion to withdraw was denied as was a request for a hearing on his motion to withdraw the guilty plea. Creech appealed the denial. This appeal was subsequently dismissed by the Idaho Supreme Court.

Creech subsequently renewed his motion to withdraw. The motion to withdraw was again denied on March 6, 1984. Creech again appealed the denial of his motion to withdraw the guilty plea. The Idaho Supreme Court affirmed the denial on December 31, 1985. The State district court issued a death warrant on January 10, 1986, ordering Creech's execution for February 3, 1986.

II. DISCUSSION

A. Preliminary Review of the Petition

Creech brings this petition pursuant to 28 U.S.C. § 2254, challenging his conviction and imposition of the death penalty. This court has jurisdiction pursuant to 28 U.S.C. §§ 2241 and 2254.

Rule 4 of the Rules Governing Section 2254 Habeas Corpus Cases provides that the petition shall be promptly examined by the district judge, and if it plainly appears from the face of the petition that the petitioner is not entitled to relief in the district court, the petition shall be summarily dismissed.

Creech asserts six basic grounds for relief. These assertions can be briefly summarized as follows:

1. Creech unknowingly waived two potential defenses at the time he entered his guilty plea and, hence, the plea was not understandingly made. Creech asserts (a) he mistakenly believed any killing by a prisoner serving a life sentence was first degree murder, and (b) that a psychological evaluation had just begun at the time he entered his plea and the results of that evaluation support a defense of insanity.

2. The lack of adequate time for counsel to prepare for court hearings (due to inadequate notice of those hearings and counsel's work load with the Ada County Public Defender's Office) denied Creech effective assistance of counsel.

3. The post-conviction proceedings at both the trial and appellate levels were fundamentally unfair. Creech asserts (a) the trial court's setting of a two-week time period after remittitur as the deadline for filing all post-conviction challenges, subject to waiver if not timely filed, and (2) the absence of any findings of fact by either the trial court or the Idaho Supreme Court, constituted fundamentally unfair post-conviction proceedings.

4. The issues raised by Creech's specific challenges to the Idaho death penalty statutory scheme are currently under consideration by the Ninth Circuit. *See Adamson v. Ricketts*, 758 F.2d 441, *withdrawn, reh'g granted* (en banc), 764 F.2d 1343 (9th Cir. 1985). Creech challenges those provisions of the Idaho Code which require the finding of aggravating and mitigating circumstances to be made by the court sitting without a jury.

5. The state court's failure to consider the proffered mitigating circumstance of Creech's mental incapacities at the time of the killing.

6. The sentencing hearings were conducted in an unlawful manner. Creech asserts the first sentencing hearing was conducted unlawfully in that the trial court considered, in finding aggravating and mitigating circumstances, such materials as the presentence report, physicians' reports, and newspaper articles without giving Creech the opportunity to cross-examine or rebut these materials, and thus ignoring well-established reliability requirements for capital cases. Creech also asserts the trial court violated an Idaho statute requiring consideration of only live testimony given at the sentencing hearing. Further, Creech asserts the trial court found

and weighed two aggravating circumstances which were simply nonexistent. Finally, Creech contends he should have been allowed time to investigate, prepare for, and present information at the second sentencing hearing (at which time the court simply read its previous findings).

It is not clear from the petition whether Creech has presented all of these issues to the Idaho Supreme Court. Consequently, the court is unable to find at this time that Creech has exhausted all available state remedies. However, it does not appear from the petition that Creech has not exhausted all state remedies. Further, the allegations supporting each of the six primary bases for relief, on their face, are not insubstantial. Therefore, the court is unable to determine from the face of the petition that it plainly appears the petitioner is not entitled to relief in this court. Summary dismissal is not appropriate.

The application to proceed in forma pauperis is in the proper form and establishes the petitioner's indigency. Therefore, the petition shall be filed and served.

B. Application for Stay of Execution of the Sentence of Death

Title 28, U.S.C. § 2251 provides that a judge of the United States before whom a habeas corpus proceeding is pending may stay any proceeding in state court against the petitioner for any matter involved in the habeas corpus proceeding. There is no question that the State's execution of Creech is a matter involved with this habeas corpus proceeding. Therefore, Section 2251 provides this court with the jurisdiction to entertain the application for

stay of execution and the power to grant that stay, if warranted.

While there is no well-developed body of case law to guide the decision to grant or deny a stay of imminent execution of a death sentence, Fourth Circuit Judge Phillips has identified what I believe are the essential factors which must be considered in determining whether or not to grant the stay. Relying upon the opinion of Mr. Justice Rehnquist set out in *Evans v. Bennett*, 440 U.S. 1301 (1979), Circuit Judge Phillips stated:

> In the final analysis, there is required a practical judgment whether in the particular situation "the legal issues have been sufficiently litigated and relitigated that the law must be allowed to run its course"; and whether the criminal defendant's entitlement to "all the protections . . . which surround him under our system prior to conviction and during trial *and appellate review*" [emphasis mine] have been accorded.

Shaw v. Martin, 613 F.2d 487, 491 (4th Cir. 1980) (emphasis in original).

Clearly, that point has not been reached in this case. This is Creech's first petition for writ of habeas corpus in the federal courts, and with the exception of his petition for writ of certiorari to the United States Supreme Court (which was denied), this is his first attempt to litigate those issues asserted in the petition in federal court. Creech is in no way attempting to relitigate an issue already decided by the same tribunal before which it is pending.

As to the second factor, Creech is entitled to pursue federal habeas corpus review of alleged constitutional

deficiencies in the state court proceedings. Although there are "sharply differing views over whether our law *ought to provide* that one convicted of crime in state court may obtain a second 'collateral' review in federal courts of constitutional issues arising from his conviction. . . . the law of our country *does provide for it* and federal court judges take an oath to carry out that law." *Goode v. Wainwright*, 670 F.2d 941 (11th Cir. 1982) (emphasis in original).

Finally, as noted earlier, Creech's petition presents nonfrivolous issues which must be examined to determine whether his trial and appeal afforded him the rights guaranteed by the Constitution. It is simply impossible for the court to responsibly address the issues raised in the petition prior to the scheduled time for execution of the death sentence. Consequently, the application for stay of execution of Creech's death sentence should be granted. *See Barefoot v. Estelle*, 463 U.S. 880 (1983); *Dobbert v. Strickland*, 670 F.2d 938 (11th Cir. 1982); *Shaw v. Martin*, 613 F.2d 487 (4th Cir. 1980).

The court has considered the potential for deliberate dilatoriness in submitting the petition and seeking a stay at this late date so that the court might feel the inevitable pressure "which is brought to bear upon any judge or group of judges and inclines them to grant last-minute stays in matters of this sort just because no mortal can be totally satisfied that within the extremely short period of time allowed by such a late filing he has fully grasped the contentions of the parties and correctly resolved them." *Evans v. Bennett*, 440 U.S. at 1307. Since the death warrant was issued on January 10, 1986, Creech unsuccessfully sought a stay from both the state trial court and the Idaho

Supreme Court. The court is satisfied that the record demonstrates counsel for Creech has made expeditious efforts to receive a stay, culminating in presentation of the petition to this court.

III. ORDER

Based upon the foregoing and the court being fully advised in the premises,

IT IS HEREBY ORDERED that the application to proceed in forma pauperis should be, and is hereby, GRANTED.

IT IS FURTHER ORDERED that the petition for writ of habeas corpus shall be filed and served on the named respondents. The respondents shall file an answer to the petition within twenty (20) days of the date the petition is served on them.

IT IS FURTHER ORDERED that the application for stay of execution of death sentence is granted. An order will issue accordingly.

DATED this 31 day of January, 1986.

/s/ Harold L. Ryan
HAROLD L. RYAN
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

THOMAS E. CREECH, Petitioner, v. A. J. ARAVE, Warden, Idaho State Penitentiary, and AL MURPHY, Director, Idaho State Board of Corrections, Respondents, JIM JONES, Attorney General of the State of Idaho, Additional Respondent.	)	CIVIL NO. 86-1042 MEMORANDUM OPINION AND ORDER (Filed Jun. 18, 1986)

I. INTRODUCTION

This is a habeas corpus action brought pursuant to 28 U.S.C. § 2254 (1984). The petitioner, Thomas E. Creech, is currently incarcerated at the Idaho State Correctional Institution (ISCI) pursuant to a state court Judgment. Creech is under penalty of death for the murder of David Jensen. Jensen was killed by Creech on May 18, 1981. At that time, both Creech and Jensen were inmates at ISCI and were being housed in the maximum security unit of the prison, and Creech was serving two life sentences for previous convictions of first degree murder. Creech pled guilty to the first degree murder of Jensen on August 28, 1981.

Creech submitted his petition for writ of habeas corpus on January 29, 1986. The petition was accompanied by an application to proceed in forma pauperis and an application for stay of execution of his sentence of death. On January 31, 1986, the court granted the application to proceed in forma pauperis, ordered the petition filed and served, and stayed the execution of the death sentence. Creech attacks the validity of his guilty plea and sentence of death. Creech asserts six basic grounds for relief under the due process clauses of the fifth and fourteenth amendments, the sixth amendment's right to counsel, and the eighth amendment's proscription of cruel and unusual punishment. These assertions are briefly summarized as follows:

1. *Involuntary plea* – Creech contends his plea was involuntary because of (a) the medication he was receiving at the time he pled guilty, (b) suicidal depression, (c) his failure to fully understand the elements of the offense with which he was charged, (d) threats to his family, and (e) inadequate time to consult with his attorney.

2. *Conditional plea* – Creech contends his plea was conditional upon completion of a psychological evaluation if such evaluation showed he was incompetent to plead guilty at the time the plea was entered or that an insanity defense existed.

3. *Denial of effective assistance of counsel* – Creech contends he was denied effective assistance of counsel at the time of the plea because (1) counsel's motion for a continuance of the plea hearing was denied, and (2) during the post-conviction relief proceedings counsel was

denied adequate time in which to prepare for those proceedings.

4. *Inadequate sentencing proceedings* – Creech contends the sentencing proceedings were inadequate because the state court found nonexistent aggravating circumstances and the court denied Creech the opportunity for discovery or the presentation of evidence at the second sentencing hearing (which took place after the Idaho Supreme Court had vacated the death sentence imposed at the first sentencing hearing).

5. *Inadequacy of post-conviction relief proceedings* – Creech contends the post-conviction relief proceedings in the state court were inadequate because the state court failed to make written findings.

6. *Sentencing statutes unconstitutional* – Creech contends the Idaho death sentencing statutory scheme is unconstitutional.

II. STATE COURT PROCEEDINGS

On May 18, 1981, a Complaint was filed charging Creech with the first degree murder of David Jensen. Probable cause was established at a preliminary hearing held May 29, 1981. Creech was arraigned on June 19, 1981, before the State District Court. Creech was represented by a public defender at both the preliminary hearing and the arraignment. A copy of the information was given to Creech at the arraignment and he waived formal reading of the information. A plea of not guilty was entered and trial was set for November 2, 1981.

On August 28, 1981, a hearing was held at which Creech changed his plea of not guilty and entered a plea of guilty to the charge of first degree murder. This hearing was prompted by a letter from Creech to Judge Newhouse, the state trial judge presiding over the case. This letter from Creech was dated August 26, 1981. Judge Newhouse accepted the plea of guilty, ordered a presentence investigation report, and set the matter down for further proceedings.

The judgment of conviction and sentence of death were entered January 25, 1982. The death sentence was vacated by the Idaho Supreme Court. Creech was resentenced to death on March 17, 1983. This sentence of death was affirmed on appeal by the Idaho Supreme Court. *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983). Creech subsequently moved to withdraw his guilty plea. The motion was denied by the state trial court. The trial court's denial of the motion to withdraw the guilty plea was affirmed on appeal by the Idaho Supreme Court. *State v. Creech*, 109 Idaho 592, 710 P.2d 502 (1985).

III. ANALYSIS

A. Need for an evidentiary hearing

On March 18, 1986, the court met in chambers with counsel to discuss a briefing schedule and the need for an evidentiary hearing. This meeting was unreported. On March 19, 1986, the court entered an order establishing a briefing schedule and setting a date for hearing in the matter. The order reflects that briefing was to be completed by April 18, 1986, and that a hearing was set for either May 9 or May 23, 1986, depending on the court's

calendar. The time lag between final briefing and a hearing date was necessary to allow the court to review counsel's positions and determine the need for and scope of an evidentiary hearing. The court's May 8, 1986, order established a new briefing schedule, continued the May 23rd hearing date until May 29, 1986, and documented counsel's inability to meet the earlier established deadlines.

Primarily due to petitioner's counsel's inability to comply with the briefing schedule (ten days of the delay is attributable to the respondent and twenty-one days is attributable to the petitioner), the court was left with only ten days between the completion of briefing and the time set for hearing rather than the twenty-one days allowed for in the original scheduling order. Briefing was completed on May 19, 1986, and the court informed counsel on May 22, 1986, of the nature and scope of the hearing. The court ordered an evidentiary hearing limited to the introduction of testimony and exhibits relevant to the medication, or lack thereof, being used by Creech at the time he pled guilty and the effect of the use of such medication. The court concluded that all other factual issues raised by the petition and briefing were adequately presented and documented in the State proceedings.

At the May 29th hearing, counsel for the petitioner was not prepared to proceed with the evidentiary portion of the hearing on the grounds that the court had failed to appoint an expert as requested and had failed to specifically grant discovery. In addition, counsel indicated generally that he had simply not had enough time to prepare for the evidentiary hearing.

After admonishing petitioner's counsel that his unexcused dilatoriness was the primary cause of his perceived difficulties, the court indicated it would not be possible to continue the matter. Argument was given on the legal issues raised by the petition and briefing.

1. Basis for denying petitioner's motion for continuance.

The petitioner has at no time during these proceedings moved for the appointment of an expert to assist him in this matter. Similarly, the petitioner has failed to identify specific factual issues for which discovery was required. The only formal request for the assistance of an expert and discovery is found on page 42 of the petition under the "PRAYER." There, the petitioner asked the court to "appoint experts to assist Petitioner in preparation and presentation of his claims" and "order discovery on behalf of petitioner pursuant to Rule 6 of the Rules Governing Section 2254 Cases."

Although the matter of discovery and an evidentiary hearing was discussed with counsel in chambers on March 18, 1986, counsel for the petitioner indicated only his general need for discovery on a variety of issues all of which at that time appeared to have been adequately covered in the state court proceedings. The court so indicated to counsel.

In sum, the petitioner failed to advise the court of the need for discovery and expert assistance on specific factual issues in a fashion that would allow the court to determine whether such discovery and assistance was necessary. Nor did the petitioner advise the court that

notification of the parties on May 22, 1986, as to the nature and scope of the May 29th hearing would not provide counsel with adequate time to prepare for that hearing. Finally, as noted earlier, the petitioner's own delinquency in this matter culminated in the drastically reduced period of time between the end of briefing, at which time the court could determine the nature and scope of the hearing necessary and the date set for hearing – that being the period of time for counsel's final preparation for the hearing. Hence, the petitioner's motion to continue the May 29, 1986, hearing was denied.

B. Procedural Default

The respondent argues that all federal claims brought by Creech are barred by the doctrine of procedural default. The respondent cites the United States Supreme Court's decisions in *Wainwright v. Sykes*, 433 U.S. 72 (1977), and *Engle v. Isaac*, 456 U.S. 107 (1982), in support of this proposition. Those cases, however, are inapposite. Both *Wainwright* and *Engle* involve a petitioner's failure to comply with the State's contemporary objection rule and the state appellate courts refused to hear the petitioner's claims for failure to so comply. The Supreme Court in those cases simply held that because the petitioner had procedurally defaulted on those claims in the state courts, they could not then be raised in federal habeas proceedings.

In this case, the respondent has identified no procedural default which has occurred in the state courts. Rather, the respondent suggests Creech is barred from raising his federal claims in this court because he has not

previously raised those claims in state court. The respondent chooses to characterize this as a procedural default rather than a failure to exhaust state remedies because of the state trial court's order that all claims for post-conviction relief be filed on or before February 6, 1984. Any claims not made by that time were deemed waived.

Clearly, the Idaho Supreme Court has not defaulted any of Creech's claims for failure to comply with the trial court's order. The only reference made to the trial court's order is in the last paragraph of its opinion in *State v. Creech*, 109 Idaho 592, 710 P.2d 502 (1985). The court stated:

> Defendant also challenges that portion of the January 24 order which deemed all issues not raised in the proceedings waived. However, during the proceedings defendant did not seek to raise any issues other than withdrawal of his guilty plea. On appeal, defendant has failed to show that he has been prejudiced in any way by the waiver portion of the order. Therefore, the issue is not properly before us.

Id. at 597. It is clear from this language that the Idaho Supreme Court simply refused to address the question of the propriety of the trial court's order.

Respondent's position is effectively one asserting Creech has failed to exhaust available state remedies on the federal claims now raised in this habeas proceeding. The respondent suggests that because the only issue presented to the Idaho Supreme Court in *State v. Creech*, 109 Idaho 592, 710 P.2d 502 (1985), was the propriety of the trial court's denial of Creech's motion to withdraw his guilty plea, that motion being brought pursuant to Rule

33 of the Idaho Rules of Criminal Procedure, the Idaho Supreme Court did not pass on the constitutional issues now being raised. This argument is without merit.

A review of the appellate briefs submitted to the Idaho Supreme Court in *State v. Creech, id.*, as well as the Idaho Supreme Court's decision in that case (particularly the dissenting opinion of Justice Bistline) demonstrates that the constitutional issues now raised by Creech were raised and considered by the Idaho Supreme Court. It is of no consequence that the Idaho Supreme Court evaluated the constitutional claims under the "manifest injustice" standard specified by Rule 33.

The court finds that Creech has not procedurally defaulted on any claims raised in his habeas proceeding nor has he failed to exhaust state remedies available to redress those claims.

C. Failure to Grant Defense Counsel's Motion for Continuance of the Plea Hearing

In a handwritten letter to Judge Newhouse, dated August 26, 1981, Creech stated he wished to change his plea of not guilty to a plea of guilty and requested a hearing as soon as possible.[1] The record does not disclose

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[1] The text of Creech's letter is set out below:

"Dear Sir,

"I'm writing to you in regards to changing my plea. I would like to have a hearing so I may change my plea from not guilty to guilty. My attorneys have

(Continued on following page)

when Judge Newhouse received the letter. Judge Newhouse, upon his own motion, set the matter for hearing and the hearing was held on August 28, 1981, at 11:10 a.m. The record also does not disclose how this hearing was noticed or how and when counsel for the defense and the prosecution were notified of the impending hearing. The attorney for Creech representing him at the time he entered his guilty plea (and who continues to represent Creech in this proceeding) states by way of affidavit filed in this action that:

> "On that day I was ushered into Court by Judge Newhouse. I had just barely finished a very high publicity trial of an attempted murder charge, State v. Elmer Manchester. In fact, Mr. Manchester's verdict of acquital [sic] came in the same morning that Tom Creech was allowed to plead guilty. I had absolutely no advance notice that a guilty plea was going to be entertained on that

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(Continued from previous page)

advised me against doing this, but at the same time tell me I'm going to be convicted regardless of whether I go to trial or not.

"It is my wish that I be alowed [sic] to change my plea, and enter a new plea of guilty to the charges against me. I have given this a great deal of thought and I am aware of what my punishment can be. But, I am ready to accept the responsibility of taking another life (which I did) and I am ready to accept and face my punishment.

"Therefore I would appreciate an immediate hearing or as soon as you can possibly set a date. Thank you for your time in this matter!

"Respectfully yours, Thomas E. Creech"

> day. I was allowed some short time (less than fifteen minutes, if I recall correctly) to counsel Petitioner to try to talk him out of pleading guilty, or at least talking him into a continuance."

Affidavit of Rolf M. Kehne, filed May 29, 1986, at 11.

The following discussion took place at the beginning of the plea hearing.

> MR. KEHNE: As the Court is aware from the record, Mr. Creech is here upon his desire to withdraw his not guilty plea and tender to the Court a guilty plea.
>
> I want it clear that that is against my advice and it is without my consent. Mr. Creech is refusing to obey my advice, my legal advice to him.
>
> I am not real clear what my responsibilities, my professional responsibilities are in this situation.
>
> I would prefer that we continue this matter for a matter of five days or so so that I could research the issue and consult with lawyers who have handled more death cases than myself before the Court hears the plea.
>
> MR. HARRIS: Your Honor, I think the question of continuance should be left to the defendant. There has never been a representation made to the Court or to me that Mr. Creech is not fully competent to make his own decisions within the realm of the law.
>
> I would oppose a continuance unless in fact the defendant in this case represents that he

> feels it is in his best interest to continue this case.
>
> I am not certain, as evidently Mr. Kehne is not either, what his ethical responsibilities are with regard to continuing representing this defendant. However, I am sure legally if Mr. Creech desires to plead guilty, to change his plea at this time, there is no legal foundation for Mr. Kehne as his legal representative to object to that attempt.
>
> So I would only ask that the Court inquire of Mr. Creech at this time with regard to his intent and his desire with regard to the continuation of any defense. I would certainly not oppose the continuance if in fact the defendant thinks it is in his best interest to do so.
>
> THE COURT: We will take you first, Mr. Kehne, and then I do want to talk to Mr. Creech.
>
> MR. KEHNE: I have nothing further.
>
> THE COURT: Mr. Creech, the only matter I am really taking up to keep up with my agreement with the press at this time are probably two questions. And the first is, what's your reaction to giving your counsel a five-day continuance? I guess I want to hear that first. No, first I want to add, do you want to go forward in accordance with your letter to the Court?
>
> MR. CREECH: Yes, sir.
>
> THE COURT: Okay. What's your reaction to the statements of your counsel in requesting a continuance?
>
> MR. CREECH: I would still like to go ahead today.

THE COURT: You understand exactly what you are doing?

MR. CREECH: Yes, sir.

THE COURT: And you would like to go ahead today, no matter what your counsel says.

MR. CREECH: Yes, sir.

Respondent's Answer, Exhibit A (Transcript of Plea Hearing), filed March 5, 1986, at 39-42. Creech now argues the state trial court's failure to grant counsel's motion for continuance, under the circumstances, denied Creech his rights to due process and effective assistance of counsel.

The court notes at the outset that resolution of this issue is made difficult because of the gravity of the consequences to both parties and the fact that neither counsel's briefing nor the court's research has disclosed case law addressing similar issues under similar circumstances. However, some guidance is found in the Supreme Court's decision in *Morris v. Slappy*, 461 U.S. 1 (1983). In *Morris*, the Court addressed the defendant's motion for a continuance in the context of trial. The court stated:

> Not every restriction on counsel's time or opportunity to investigate or to consult with his client or otherwise to prepare for trial violates a defendant's Sixth Amendment right to counsel . . . . Consequently, broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary "insistence upon expeditiousness in the face of a justifiable request for delay" violates the right to the assistance of counsel. *Ungar v. Sarafite*, 376 US 575, 589, 11 L Ed 2d 921, 84 S Ct 841 (1964).

Id at 11-12 (citation omitted). The Court in *Ungar v. Sarafite* elaborated somewhat on the standard:

> There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.

Ungar v. Sarafite, 376 US at 589 (1964).

It is important to the analysis of this issue to discuss the status of Creech's case at the time he decided to change his plea of not guilty to one of guilty. At the time of his arraignment in district court on June 19, 1981, Creech pled not guilty. Trial in the matter was set to commence November 2, 1981. During July of 1981, the State moved to compel the defendant to comply with a discovery motion. The defendant was ordered to comply with the prosecution's request for discovery on or before July 14, 1981. The record does not disclose what information was sought in the prosecution's discovery request. Depositions were taken by the State of two inmates housed in the maximum security unit on the day Jensen was killed. Those depositions were taken on August 4, 1981, and August 10, 1981, with defense counsel present and cross-examining. The court has reviewed the transcripts of those depositions and neither inmate was a witness to the killing and, therefore, could not testify as to the events taking place. Apparently, only Creech knows what actually happened.

On August 11, 1981, the prosecuting attorney advised Creech's counsel that discovery would be furnished by

September 15, 1981. Creech's counsel states in his affidavit that at no time prior to the time Creech pled guilty did he or any other lawyer from the public defender's office spend significant time with Creech. At no time were the elements of the crime or possible defenses discussed. Counsel states further that it was not until sometime after the plea was entered that he discovered Creech may have been guilty of only manslaughter in the killing of Jensen.

In light of the state of the proceedings at the time Creech pled guilty (trial was still over two months away) and counsel's representations, the court finds, as a matter of fact, that counsel had not discussed with Creech the specific elements of the offense with which he was charged or possible defenses to those charges.[2]

Under these circumstances, absent the court's asking Creech if he wanted to continue the matter as requested by his attorney, there is little doubt that the judge's failure to grant the continuance constituted an unreasoning and arbitrary insistance upon expeditiousness in the

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[2] To the extent the petition can be read to include counsel's deficient performance as a basis for the claim of ineffective assistance of counsel, that basis must be rejected. The court has reviewed counsel's performance throughout the proceedings before the state courts and finds counsel's representation did not fall below an objective standard of reasonableness. *See Strickland v. Washington*, ___ U.S. ___, 80 L.Ed.2d 674, 693 (1984).

face of a justifiable request for delay.[3] However, the court did ask Creech if he wished to continue the matter.

It is true, as argued by the respondent, that every defendant has a right to represent himself. *Faretta v. State of California*, 422 U.S. 806 (1975). However, this case does not present a question of whether or not Creech exercised his right of self-representation. By pleading guilty, Creech simply elected not to follow the advice of his attorney. The question squarely presented by this case is whether or not, under the circumstances existing at the time, the state trial judge violated Creech's rights to due process and effective assistance of counsel by allowing Creech only ten or fifteen minutes to discuss the matter with his attorney. In light of the fact that the trial judge asked Creech if he wished to continue the matter so that he might consult further with his attorney and that request having been denied by Creech, the issue might be more

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[3] The record does not disclose why the state trial Judge elected to set the hearing for change of plea only two days after the letter from Creech was written and probably only one day after it was received by the judge. Given the gravity of the consequences which were virtually assured to flow from Creech's plea of guilty, there seems to be little or no reason for setting the hearing at such a time as to effectively deprive Creech's attorney of the opportunity to counsel his client. Although it is not clear whether the state trial judge acted in an extraordinary manner in proceeding as quickly as he did, as suggested by petitioner's counsel, the only effect of setting the matter at a later date would be to give Creech the opportunity to change his mind. It certainly is no affront to justice as administered in this country if a defendant elects not to plead guilty after being advised by counsel, particularly in a case where a plea of guilty will invariably result in imposition of the death sentence.

accurately framed: Did the state trial judge's failure to *allow Creech's attorney* only ten or fifteen minutes *to discuss the matter with his client* constitute a denial of due process and effective assistance of counsel?

A defendant may not be forced to abide by the advice of counsel. It is clear from the record of the plea hearing that Creech's attorney, Rolf Kehne, vigorously counseled his client not to go ahead with the plea at that time. Despite such counsel, Creech elected to go ahead with his plea of guilty on that day stating that he understood exactly what he was doing. There is nothing in the record that in any way suggests Creech did not fully understand exactly what he was doing on August 28, 1981. In fact, it was not until more than a year after he was first sentenced to death that Creech moved to withdraw his guilty plea. Creech had over four months after entry of his plea, but before sentencing, in which to consult with counsel and move to withdraw his guilty plea if he felt the plea had not been validly entered. Creech failed to do so.

Further, the only reason advanced by Kehne for the continuance was his confusion regarding his ethical responsibilities now that Creech had refused to heed counsel's advice. Kehne did not raise any of the factors now asserted as grounds for Creech's constitutional claim.

The court is unable to conclude under the circumstances existing at the time of the plea hearing that the state trial court's denial of counsel's motion for a continuance is unreasoning or arbitrary. Therefore, Creech's constitutional claim in this regard must be rejected.

D. Involuntary Plea

Creech contends his plea was not voluntarily entered because of (a) the medication he was taking at the time he pled guilty, (b) suicidal depression at the time he entered his plea, (c) his failure to fully understand the specific elements of the offense with which he was charged, (d) threats against his family which induced him to plead guilty, and (e) an inadequate amount of time in which to consult with his attorney.

1. Medication.

There is no evidence in the record indicating what medication Creech was on at the time he pled guilty or the potential or real effects of that medication.[4] The only evidence in the record is Creech's testimony at the hearing on his motion to withdraw guilty plea held before the state trial court. Creech testified that the psychotropic medication prescribed for him was changed periodically due to a tolerance buildup. Further, Creech testified that the medication typically took seven to ten days to take effect. It is not clear from this testimony if the medication required seven to ten days to take effect initially or with each change. In any event, there is nothing in this testimony to suggest the medication Creech was using or changes in medication had an adverse impact on his competence to plead guilty.

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[4] See the court's discussion of the need for an evidentiary hearing, *supra*, at pages 5-8.

2. Suicidal depression.

There is nothing in the record to suggest Creech was suicidally depressed at the time he entered his plea of guilty. Creech's statement in his letter to Judge Newhouse that "I am ready to accept the responsibility of taking another life . . . and I am ready to accept and face my punishment" may suggest Creech had accepted the virtually inevitable consequence of his plea of guilty, but it does not suggest he had become so despondent that he was unable to truly appreciate the consequences of his plea of guilty or resist making such a plea. Further, there is nothing in the testimony of the expert witnesses called on behalf of both the prosecution and the defense at subsequent sentencing hearings and post-conviction relief hearings (Doctors Heyrend and Stoner) which suggests Creech was suicidally depressed or otherwise incompetent to plead guilty at the time he entered his plea.

3. Failure to understand the elements of the offense

Creech contends his guilty plea was involuntary because he did not understand at the time he pled guilty that malice was an element of the specific type of first degree murder with which he was charged. Creech asserts he thought any killing of one inmate by another inmate constituted first degree murder.

A plea of guilty may be involuntary where the defendant has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of

guilt. *Henderson v. Morgan*, 426 U.S. 637, 645 n.13 (1976). The defendant must receive "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process." *Id.* (quoting *Smith v. O'Grady*, 312 U.S. 329, 334 (1941)).

In *Henderson*, the Court held a guilty plea was not voluntarily entered to the lesser included offense of second degree murder where that charge was not made in the indictment and the defendant had no notice of the specific intent element of second degree murder. Justice White's concurring opinion in *Henderson* makes it clear that a contrary decision must be reached in this case.

> The problem in this case is that the defendant's guilt has been established neither by a finding of guilt beyond a reasonable doubt after trial nor by the defendant's own admission that he is in fact guilty. The defendant did not expressly admit that he intended the victim's death (such intent being an element of the crime for which he stands convicted); and his plea of guilty cannot be construed as an implied admission that he intended her death because the District Court has found that he was not told and did not know that intent to kill was an element of the offense with which he was charged.[2]

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[2] . . . .

> In those cases in which the indictment is read to the defendant by the court at arraignment or at the time of his plea, his plea of guilty may well be deemed a factual admission that he did what he is charged with doing so that a judgment of conviction may validly be entered against him.

Henderson v. Morgan, 426 U.S. at 649.

In this case, Creech pled guilty to first degree murder as charged in the Information. Creech was furnished a copy of the Complaint at the preliminary hearing and waived a reading of the Complaint (which stated the charge in language identical to that found in the subsequent Information). In response to the judge's inquiry as to what the charge of first degree murder meant to Creech, he responded, "He has got to think about doing it." Whether this reflects Creech's understanding that malice was an element of the offense or that premeditation was required for first degree murder, the statement reflects knowledge that some intent is required for the charge of murder, be it first or second degree. Further, in response to questions from the prosecutor, Creech specifically admitted that he intended to kill Jensen and had kicked him in his throat and his head after Jensen was no longer a threat.

The court finds that Creech understood that malice or intent was an element of first degree murder at the time he pled guilty. Further, the record demonstrates an ample factual basis establishing the required elements of the offense, and therefore, a sufficient factual basis for the state trial court to accept the plea of guilty.

4. Threats to Creech's family.

The only evidence in the record supporting Creech's position that he pled guilty, at least in part, from threats to his family is Creech's own testimony at the hearing on his motion to withdraw his guilty plea. Creech testified that he had received mail from an inmate stating that if Creech got anyone else involved, "that there would be

problems." Creech testified that he understood this to be a threat against him personally. In addition, Creech testified that he and his mother had discussed threatening phone calls that she had received.

The court finds that this self-serving testimony by Creech is insufficient to rebut his statement at the time he pled guilty that he was doing so freely and voluntarily.

E. Conditional Plea of Guilty

Creech now argues, in effect, that his plea of guilty was entered upon the condition that ongoing psychological evaluations would not support an insanity defense. The court is not persuaded by Creech's argument in this regard. First, it is clear from the transcript of the plea hearing that Creech's plea was not conditioned upon the existence of an insanity defense, but rather upon the results of the psychological evaluation showing Creech was not competent to plead guilty. Dr. Stoner was conducting an ongoing psychological evaluation of Creech in August of 1981. Although Dr. Stoner concluded that Creech could not appreciate the wrongfulness of his conduct at the time he killed Jensen, Stoner did not opine that Creech was not competent to plead guilty, understand the nature of the offense or assist in his defense. Further, Dr. Heyrend, called by the prosecution at sentencing, specifically opined that Creech had the capacity to understand the proceedings against him and assist in his defense. Consequently, the court finds that the condition upon which withdrawal of the plea would be allowed by the state trial court was not met.

Second, a valid guilty plea constitutes an admission of facts necessary for conviction and, therefore, removes the issue of factual guilt from the case. Consequently, Creech cannot now assert the defense of insanity, a defense which attacks the factual guilt of the defendant. *See Menna v. State of New York*, 423 U.S. 61, 62 n.2 (1975); *United States v. Burke*, 694 F.2d 632 (9th Cir. 1982).[5]

F. Inadequacy of the Sentencing Proceedings

Creech argues the state sentencing proceedings were constitutionally inadequate for two reasons: (1) the sentencing judge's consideration of all information in the presentence report violated Creech's sixth amendment right to confront witnesses, and (2) the sentencing court's failure to allow Creech the opportunity for discovery or the presentation of evidence at the second sentencing hearing and the sentencing court's finding of nonexistent aggravating circumstances violated Creech's right to due process.

1. Sixth amendment confrontation right.

Creech's argument in this regard focuses upon the presentence investigation report considered by the

[5] The court notes that the defense of insanity does not attack the fact of guilt in the same sense that arguing the nonexistence of an element of the offense attacks the fact of guilt. Rather, the defense of insanity presupposes the commission of a crime for which there will be no legal responsibility due to the fact of insanity. Although the defense of insanity does not attack the fact of commission of the crime, it nonetheless attacks the fact of *guilt*.

sentencing judge. Apparently, this report contained uncorroborated and unattributed hearsay which Creech had no meaningful opportunity to cross-examine. Creech relies upon the Eleventh Circuit's decision in *Proffitt v. Wainwright*, 685 F.2d 1227 (11th Cir. 1982), in support of the proposition that the use of hearsay in capital sentencing cases, or at least such inherently unreliable hearsay as newspaper articles and editorials, violates a defendant's sixth amendment right to confront witnesses.[6]

In *Proffitt*, the Eleventh Circuit held that a sentencing court's failure to allow defense counsel to cross-examine an expert witness who testified at sentencing through a written report filed with the court violated the defendant's sixth amendment right to confront witnesses. While some of the language used by the Eleventh Circuit in that portion of its opinion discussing the confrontation issue suggests its holding may extend beyond the factual context of the case to invoke a rule identical to trial rights of confrontation, the text of the opinion as a whole suggests a narrower rule.

Prior to its discussion of the experts' testimony, the court considered defense counsel's failure to request a presentence investigation report as a grounds for claim of ineffective assistance of counsel. In rejecting petitioner's

[6] Creech also argues Idaho Code § 19-2516 requires all factors relied upon by the sentencing judge in a capital case be presented by the testimony of witnesses in open court. This argument does not present a constitutional question and it has been rejected by the Idaho Supreme Court. *State v. Creech*, 105 Idaho 362, 367, 670 P.2d 463 (1983). The contention is, therefore, without merit.

claim, the court, after noting the general nature of the presentence investigation report, made no suggestion that inclusion of a presentence investigation report would violate a defendant's confrontation rights. Consequently, the Eleventh Circuit's decision in *Proffitt v. Wainwright* is inapposite.

Further, it is clear from the Supreme Court's decision in *Gardner v. Florida*, 430 U.S. 349 (1977), that a sentencing judge may rely upon the information found in a presentence investigation report in a capital sentencing case so long as the defendant is given the opportunity to review the report and rebut evidence in that report. The petitioner does not claim that he did not have the opportunity to review or rebut information found in the presentence investigation report. Therefore, sentencing judge's consideration of information in the presentence report did not deny the petitioner due process or the sixth amendment right to confront witnesses.

2. Adequacy of the second sentencing hearing.

The petitioner contends he should have been given the opportunity to perform discovery and present evidence of mitigating circumstances at the second sentencing hearing held upon remand from the Idaho Supreme Court. The Idaho Supreme Court vacated Creech's original sentence of death because the trial Judge had failed to pronounce sentence in the presence of the defendant (as required by Idaho statute). Upon remand, the trial court simply read the sentence of death it had imposed previously in the presence of the defendant in open court. Consequently, the defect in the original sentence was

corrected. The second sentence of death was affirmed on appeal by the Idaho Supreme Court.

The court can discern no constitutional provision which would require the state courts to again conduct the full sentencing hearing at which Creech could present mitigating circumstances. Creech, having had that opportunity at the first sentencing hearing, cannot now complain of a constitutional deficiency because he was not allowed a second opportunity to present mitigating facts at a hearing held simply to correct a defect wholly unrelated to the sentencing court's previous findings of aggravating and mitigating circumstances.

3. Nonexistent aggravating circumstances.

Creech contends the sentencing proceedings denied him due process because the sentencing judge erroneously found the existence of three aggravating circumstances.

First, Creech alleges the aggravating circumstances of murder of an inmate by another inmate and murder by a person under sentence for murder (specified in Idaho Code § 19-2515(f)(7)) are nonexistent because it was never demonstrated Creech murdered Jensen. As noted earlier in this opinion, at the time Creech entered his guilty plea a sufficient factual record was established to support conviction of the charge of the first degree murder of Jensen. Consequently, this argument is without merit.

Second, Creech argues the aggravating circumstance specified in Idaho Code § 19-2515(f)(6), the exhibition of utter disregard for human life is not supported by the

record.[7] Although the sentencing judge found that Creech was initially justified in defending himself, there is ample evidence in the record to support the sentencing judge's conclusion that Creech's conduct throughout the incident demonstrated utter disregard for human life as that term has been defined by the Idaho Supreme Court.

G. Inadequacy of State Post-Conviction Relief Proceedings

Creech argues the Idaho post-conviction relief procedures used in this case violated his right to due process and the eighth amendment right proscribing cruel and unusual punishment (reflecting the requirement that reliable procedures must be used in determining who is sentenced to death). Creech bases his argument on two grounds: (1) that the two weeks allowed to file all post-conviction relief motions and a hearing date only two weeks after the filing deadline is inadequate time to prepare for post-conviction relief proceedings, and (2) the lack of findings by either the state trial court or the state supreme court make it impossible to have adequate

[7] Creech also contends the language "utter disregard for human life" is unconstitutionally vague even as it has been defined by the Idaho Supreme Court. That court has defined utter disregard "to be reflective of acts or circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer." *State v. Osborn*, 102 Idaho 405, 419, 631 P.2d 187 (1981). This limiting construction is sufficient to provide the sentencing judge with constitutionally acceptable guidelines.

appellate or collateral review of the decisions on post-conviction relief.

The due process clauses of the fifth and fourteenth amendments do not establish a right to appeal or collateral attack of a conviction through post-conviction relief proceedings. *United States v. MacCollom*, 426 U.S. 317, 323 (1976); *Douglas v. The People of the State of California*, 372 U.S. 353 (1963). However, once the state provides the right of appeal, certain due process and equal protection restrictions apply. *Id.* at 355-57. Presumably, the same can be said of post-conviction relief established by state statute. The parties have cited no cases, nor has the court's research disclosed any which address the procedural requirements of due process in the context of state post-conviction relief proceedings.

Although it may be desirable that a trial court prepare written findings to facilitate appellate review of that court's action, I am unable to discern the need for or requirement of a constitutional mandate to that effect. Further, under the circumstances of this case a formal period of only two weeks to prepare and present all post-conviction relief motions and an additional two weeks to prepare for a hearing on such motions is not so constraining as to effectively deprive Creech of his right to post-conviction relief, and therefore, does not constitute a violation of due process.[8]

[8] Creech, in fact, has had a good deal more time in which to prepare for post-conviction relief proceedings. Creech was sentenced to death on January 25, 1982. This sentence of death was affirmed by the Idaho Supreme Court on May 23, 1983.

(Continued on following page)

H. Unconstitutionality of the Idaho Death Sentencing Statutes

Petitioner argues that Idaho's death penalty statute is unconstitutional because (1) it does not provide for jury participation in the sentencing process in violation of the sixth amendment, and (2) the mandatory nature of imposition of the death sentence violates due process under the fifth and fourteenth amendments and the eighth amendment proscription of cruel and unusual punishment.[9] First, Creech's argument that jury participation is constitutionally required in capital sentencings must be rejected. The Supreme Court held in *Spaziano v. Florida*, 468 U.S. ___, 82 L.Ed.2d 340 (1984), that the Constitution

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(Continued from previous page)

Hence, Creech had nearly a year in which to formulate post-conviction relief strategy. The fact that Creech's first motion to withdraw his guilty plea had been denied and the appeal of that denial was pending throughout much of 1983 did not prevent Creech from preparing other motions or theories for post-conviction relief.

[9] The parties have not briefed this issue because they were under the impression that it would be resolved in the Ninth Circuit's en banc decision in *Adamson v. Ricketts*. That decision rested on other grounds, and therefore, the Ninth Circuit's final decision in that case did not address the issue now presented to this court. *See Adamson v. Ricketts*, Appellate Court Case No. 84-2069 (9th Cir. en banc decision filed May 9, 1986), *rehr'g denied*, May 22, 1986, and motion to stay mandate currently pending. Although the Ninth Circuit ultimately did not resolve this issue in the *Adamson* case, the first decision filed April 18, 1985, (758 F.2d 441 (9th Cir. 1985)) provides a persuasive analysis of those issues. After reviewing the case law cited by the Ninth Circuit in its original decision, the court feels further briefing on this issue is unnecessary.

does not require that a jury have the responsibility of deciding whether or not the death penalty will be imposed. The Court stated:

> In light of the facts that the Sixth Amendment does not require jury sentencing, that the demands of fairness and reliability in capital cases do not require it, and that neither the nature of, nor the purpose behind, the death penalty requires jury sentencing, we cannot conclude that placing responsibility on the trial judge to impose the sentence in a capital case is unconstitutional.

Id. 82 L.Ed.2d at 355.

Creech also argues the Idaho statute is unconstitutional because it requires imposition of a sentence of death if the court finds any one of a number of aggravating circumstances unless mitigating circumstances are found to outweigh the gravity of any aggravating circumstances. Creech argues this mandatory requirement impermissibly shifts the burden of proof to the defendant. This argument must be rejected.

The sentencing court is required to consider the character and record of the offender and the circumstances of the specific offense. *Woodson v. State of North Carolina*, 428 U.S. 280 (1976). In addition, the sentencing court must have standards for selecting the offenders who receive the death penalty. *Roberts v. State of Louisiana*, 428 U.S. 325 (1976). The Idaho sentencing procedure meets these requirements.

The chief concern in reviewing a death sentencing statute is that all mitigating evidence be considered and weighed. *Lockett v. State of Ohio*, 438 U.S. 586 (1978). The

Idaho statute not only does not limit consideration of mitigating factors, but implicitly mandates such consideration in its requirement that any aggravating circumstances found be compared to mitigating circumstances. Therefore, the court finds Creech's contention that the Idaho death sentence statutory scheme is unconstitutional is without merit.

IV. CONCLUSION

For the foregoing reasons, the Petition for Writ of Habeas Corpus must be denied. Because the court anticipates the petitioner will apply for a certificate of probable cause so that he may appeal all or part of this court's decision, the stay of execution of the sentence of death shall remain in effect for a short period of time to avoid the necessity of petitioning the Ninth Circuit Court of Appeals for an emergency stay.

V. ORDER

Based upon the foregoing and the court being fully advised in the premises,

IT IS HEREBY ORDERED that the Petition for Writ of Habeas Corpus should be, and is hereby, DENIED.

IT IS FURTHER ORDERED that the stay of execution of the sentence of death shall remain in effect to and including July 10, 1986, after which the stay heretofore issued by this court shall thereupon be dissolved.

DATED this 18th day of June, 1986.

/s/ Harold L. Ryan
HAROLD L. RYAN
UNITED STATES DISTRICT
JUDGE

Supreme Court, U.S.
FILED
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No. 91-1160

In The

Supreme Court of the United States

October Term, 1992

A. J. ARAVE, WARDEN,

Petitioner,

v.

THOMAS E. CREECH,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITIONER'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED FOR REVIEW

1. Is Idaho's statutory aggravating factor which authorizes the death penalty for murders committed with utter disregard for human life unconstitutionally vague because the limiting construction of this factor announced by the Idaho Supreme Court does not require that the factor be defined with reference to the occurrence of specifically defined acts?

2. May a United States Court of Appeals vacate a death sentence by interpreting a state statute to require a sentencing judge to make an express finding of the existence of particular factual components of a statutory aggravating circumstance?

3. When a death sentence is vacated by a state appeals court to correct a procedural defect of state law, does the Constitution require that sentencing proceedings be reopened to receive evidence of a prisoner's post-sentencing conduct in prison?

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CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eighth Amendment to the Constitution of the United States, provides in pertinent part:

> " . . . nor cruel and unusual punishment inflicted."

Title 28, § 2254(a), United States Code, provides, in pertinent part:

> [A] circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Idaho Code § 19-2515 provides, in pertinent part:

> (c) Where a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the court finds at least one (1) statutory aggravating circumstance. Where the court finds a statutory aggravating circumstance the court shall sentence the defendant to death unless the court finds that mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstance found and make imposition of death unjust.
>
> (d) In all cases in which the death penalty may be imposed, the court shall, after conviction, order a presentence investigation to be conducted according to such procedures as are prescribed by law and shall thereafter convene a sentencing hearing for the purpose of hearing all relevant evidence and arguments of counsel in aggravation and mitigation of the offense. At

such hearing, the state and the defendant shall be entitled to present all relevant evidence in aggravation and mitigation. Should any party present aggravating or mitigating evidence which has not previously been disclosed to the opposing party or parties, the court shall, upon request, adjourn the hearing until the party desiring to do so has had a reasonable opportunity to respond to such evidence. Evidence admitted at trial shall be considered and need not be repeated at the sentencing hearing. Evidence offered at trial but not admitting may be repeated or amplified if necessary to complete the record.

(e) Upon the conclusion of the evidence and arguments in mitigation and aggravation the court shall make written findings setting forth any statutory aggravating circumstance found. Further, the court shall set forth in writing any mitigating factors considered and, if the court finds that mitigating circumstances outweigh the gravity of any aggravating circumstance found so as to make unjust the imposition of the death penalty, the court shall detail in writing its reasons for so finding.

(f) Upon making the prescribed findings, the court shall impose sentence within the limits fixed by law.

(g) The following are statutory aggravating circumstances, at least one (1) of which must be found to exist beyond a reasonable doubt before a sentence of death can be imposed:

. . .

(6) By the murder, or circumstances surrounding its commission, the defendant exhibits utter disregard for human life.

(7) The murder was one defined as murder of the first degree by section 18-4003, Idaho Code, subsections (b), (c), (d), (e) or (f), and it was accompanied with the specific intent to cause the death of a human being.

Idaho Code § 18-4003 provides in pertinent part:

(c) Any murder committed by a person under a sentence for murder of the first or second degree, including such persons on parole or probation from such sentence, shall be murder of the first degree.

. . .

(e) Any murder committed by a person incarcerated in a penal institution upon a person employed by the penal institution, another inmate of the penal institution or a visitor to the penal institution shall be murder of the first degree.

Idaho Code § 19-2827(c) provides as follows:

(c) With regard to the sentence the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether the evidence supports the judge's finding of a statutory aggravating circumstance from among those enumerated in section 19-2515, Idaho Code, and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and defendant.

STATEMENT OF THE CASE

On May 13, 1981, the respondent, Thomas Eugene Creech, who was serving sentences for first degree murder in the Idaho State Correctional Institution, murdered David Dale Jensen, another inmate. Jensen had been convicted of car theft. Sometime prior to his incarceration, Jensen had suffered a gunshot wound to the head which left him physically and mentally handicapped. Part of his brain had been removed, and he had a plastic plate in his skull. *State v. Creech*, 670 P.2d 463 (Idaho 1983), rehearing denied (1983), cert. den., 465 U.S. 1051 (1984). Creech was charged with murder in the first degree. Information, JA p. 16. Over the objection of his attorney, he entered a plea of guilty. *Creech, supra.* The court conducted a sentencing hearing at which it received evidence in aggravation and mitigation. At the conclusion of this hearing, the court took the case under advisement and later issued written findings. Creech was sentenced to death. JA pp. 31-37. In accordance with Idaho's capital sentencing statutes, see Idaho Code § 19-2515, the trial judge made findings of the existence of statutory aggravating factors. In particular, the court concluded that the defendant was under sentence for a previous murder at the time the Jensen killing occurred, that the defendant, by the murder or circumstances surrounding its commission, exhibited utter disregard for human life, that the defendant had murdered

another correctional institution inmate, and that the defendant had exhibited a propensity to commit murder which would be a continuing threat to society. Findings, JA pp. 33-34.

Creech appealed his sentence to the Idaho Supreme Court. During the pendency of the proceedings, the supreme court remanded the case to the district judge, stating in its order that Idaho Code § 19-2503, and Idaho Criminal Rule 43(a), required that sentence be pronounced in open court in the presence of the defendant and his attorney, rather than merely presented in writing. This remand was temporary. The Idaho Supreme Court retained jurisdiction and gave the judge only 14 days to carry out the order. *Creech, supra.* The trial court then pronounced judgment in Creech's presence and denied a motion by Creech's attorney to receive additional evidence in mitigation. Creech's sentence was upheld on appeal to the Idaho Supreme Court. The court concluded that the evidence supported the findings of aggravating circumstances. It rejected a claim by Creech that the utter disregard factor, Idaho Code § 19-2515(g)(6), was unconstitutionally vague. *Creech, supra.* The court pointed out that it had imposed a limiting construction on this statutory aggravating circumstance in *State v. Osborn*, 631 P.2d 187 (1981), and that the factor, as limited, was sufficiently narrow to withstand constitutional scrutiny. *Id.* Creech filed a petition for a writ of certiorari in this court, which was denied. 465 U.S. 1051 (1984).

Thereafter, Creech filed a petition for a writ of habeas corpus in the United States District Court for the District of Idaho. Petition, JA p. 77. The petition alleged, among other things, that state court had made inadequate factual

findings, petition, JA pp. 95-96, that the "utter disregard" aggravating circumstance was unconstitutionally vague, JA p. 100, and that he was not given a second meaningful sentencing hearing when the Idaho Supreme Court temporarily remanded the case to the district court. JA pp. 112-116.

The United States District Court denied relief, and Creech appealed to the United States Court of Appeals for the Ninth Circuit. His case was argued in 1988. The Court of Appeals rejected most of Creech's claims, but as to three of them, granted relief. The court held that Idaho's "utter disregard" aggravating factor was unconstitutionally vague and that the limiting construction of the Idaho Supreme Court was insufficient. *Creech v. Arave*, 947 F.2d 873 (9th Cir. 1991). The court also held that the trial judge erred by failing to find that Creech had acted with specific intent in the murder of David Dale Jensen, a component of Idaho's aggravating factor which provides that the murder of an inmate by another inmate or a murder committed by a person under a sentence of murder is a capital offense if accompanied by a showing of specific intent to kill. *Id.* Finally, the court held that *Skipper v. South Carolina*, 476 U.S. 1 (1986), entitled Creech to a second sentencing hearing when his case was temporarily remanded by the Idaho Supreme Court. The warden of the Idaho State Correctional Institution petitioned this court for a writ of certiorari, which was granted.

SUMMARY OF ARGUMENT

I. The court of appeals was in error in holding that *Walton v. Arizona*, 497 U.S. 639 (1990), requires a state to

define aggravating circumstances with reference to specific objective acts. Idaho's "utter disregard factor" refers only to the most callous and cold-blooded killings. Callousness and cold-bloodedness are not terms so subjective that they are incapable of principled application in a state's death sentencing scheme and these definitions satisfy *Walton's* requirement for narrowing in a judicial sentencing state.

(1) In addition, Idaho assigns sentencing to judges, rather than juries, subject to independent review by the Idaho Supreme Court, and it is presumed that judges are familiar with and apply the law and that state appellate courts give each defendant an individualized, reliable sentencing determination.

(2) Idaho has not only the framework for a sentencing system that avoids arbitrary and capricious results in capital cases, Idaho's courts have applied the "utter disregard" circumstance in a narrow and principled way. This factor has not been used as a "catch-all" circumstance designed to unduly broaden the availability of a sentence of death.

(3) The United States Court of Appeals for the Ninth Circuit exceeded its power to review state court judgments. It gave no credit to the independent review function of the Idaho Supreme Court and misinterpreted the trial court's factual and legal findings.

II. Whether a state court must make express findings of facts which are components of a statutory aggravating circumstance is a matter of state law. The United States Court of Appeals for the Ninth Circuit exceed the scope of federal habeas review by holding, without authority,

that the trial judge's finding that the state had proved factor (g)(7) in Idaho Code § 19-2515 (murder by an inmate or murder by one under sentence for murder) was invalid because the trial judge had not expressly found facts implicit in such a conclusion, that is, the murder was accompanied by specific intent to kill.

III. Creech's case was temporarily remanded to the district court during the pendency of his direct appeal. The remand was temporary, for the purpose of allowing the judge to correct a procedural error. Idaho law requires that sentence be pronounced in the presence of the defendant. The district court had not complied with this requirement.

The Idaho Supreme Court retained appellate jurisdiction during the remand and required the district court to act within 14 days. Creech was not, by virtue of *Skipper v. South Carolina*, 476 U.S. 1 (1986), entitled to demand a second full sentencing hearing when his case was returned to the trial court. *Skipper* applies only to questions of the relevance of the defendant's prison conduct when such evidence is offered at the defendant's original sentencing hearing. *Skipper* does not create a right to seek revision or modification of sentence whenever a prisoner might be able to produce potentially mitigating evidence of post-trial prison conduct.

ARGUMENT

I. The Idaho Supreme Court's Limiting Construction Of The State's "Utter Disregard" Aggravating Factor Is Constitutionally Sufficient; The Court of Appeals' Holding To The Contrary Is Not Consistent With This Court's Precedent.

The State of Idaho seeks to validate an important provision of its capital sentencing statutes. Idaho law

provides that in capital cases sentence is to be imposed by the trial judge, subject to independent review by the Idaho Supreme Court. Idaho Code sections 19-2515(f); 19-2827(c). The sentencing judge is empowered to impose a sentence of death in cases of first degree murder upon a finding of one or more statutory aggravating circumstances. Idaho Code 19-2515(g). One such provision of the statute authorizes a death sentence if the circumstances of the murder exhibited "utter disregard for human life." Idaho Code 19-2515(g)(6) This factor is similar in its subjective character to another which authorizes a death sentence on a finding that the murder was "especially heinous, atrocious or cruel, manifesting exceptional depravity." Idaho Code 19-2515(g)(5). Although the validity of the "utter disregard" factor has not been directly considered by this Court, the similar "heinousness" factor has been and the Court has not found it lacking solely because it cannot be applied with mathematical objectivity. *See Gregg v. Georgia*, 428 U.S. 153 (1976); *Walton v. Arizona*, 487 U.S. 639 (1990).

The Idaho Supreme Court has imposed a narrowing construction on both the "utter disregard" and "heinousness" factors. *State v. Osborn*, 631 P.2d 187 (Idaho 1981). Its construction does not make findings of the aggravating factors depend on the presence of particular facts. Instead, Idaho has chosen to rely on the ability of the sentencing judge to make principled distinctions between capital and non-capital cases with guidance that is somewhat subjective but nonetheless capable of genuinely narrowing the conditions on which the death penalty can be imposed.

In this case below, the Ninth Circuit Court of Appeals struck down Idaho's utter disregard factor on grounds that are inconsistent with *Walton* and by doing so unduly intruded on the State's power to establish and enforce penalties for criminal conduct.

A. The Court of Appeals' "Objective Standards" Requirement Mistakes The Holdings Of This Court's Cases Concerning The Sufficiency Of State Limiting Constructions And Is Inconsistent With Standards Applicable To Judicial Sentencing Systems.

The "utter disregard" and the analogous "heinousness" factors of Idaho Code 19-2515(g)(5) and (6) describe two different kinds of culpability, each of which has been legislatively identified as a sentencing factor of special importance in cases where the death penalty may be imposed.

Section (g)(5), referring to the heinousness, atrociousness or cruelty of the murder and the depravity of the act, specifically refers to the personal culpability of the killer as revealed by the manner in which the crime was committed. Thus, this factor was described in *Gregg v. Georgia*, 428 U.S. 153 (1976), as one that relates to cases where "the offense of murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." The Idaho Supreme Court took the same approach to characterizing the meaning of the "heinousness" factor in *Osborn*, supra:

> What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies – the conscienceless or pitiless crime which is unnecessarily torturous to the victim. Quoting State v. Dixon, 283 So.2d 1 (Fla. 1973), *cert. den.*, 416 U.S. 943 (1974). 102 Idaho at 418.

On the other hand, the "utter disregard" factor refers not to the outrageousness of the acts accompanying the murder, but to the defendant's lack of conscientious scruples against killing another human being. See *State v. Fain*, 774 P.2d 252 (Idaho 1989). In *Osborn*, the Idaho Supreme Court construed the utter disregard factor as one referable to circumstances different from those encompassed by the "heinousness" factor of section 19-2515(g)(5):

> Since we will not presume that the legislative intent was to duplicate any already enumerated circumstance, thus making I.C. 19-2515(f) [sic] (6) mere surplusage [citation omitted], we hold that the phrase "utter disregard" must be viewed in reference to acts other than those set forth in Idaho Code §§ 19-2515 (f) [sic] (2), (3) and (4). We conclude instead that the phrase is meant to be reflective of acts or circumstances surrounding the crime which exhibit the highest, the utmost callous disregard for human life, i.e., the cold blooded, pitiless slayer. 102 Idaho at 405.

The particularly cold-blooded killer, who is typified by such offenders as the respondent Creech who kills for the sake of killing, see *State v. Creech*, 670 P.2d 463 (Idaho 1983) cert. den. 465 U.S. 1051 (1984); *State v. Card*, 825 P.2d

1081 (Idaho 1991), or who is prepared to kill without hesitation to accomplish some legally unacceptable goal, *State v. Paradis*, 676 P.2d 31 (Idaho 1983), need not act sadistically or in an especially outrageous fashion in order to commit a killing with utter disregard for human life. One who commits a murder in an especially heinous way is punished for the heinousness of the crime, not because he acted with utter disregard for human life. Although it may be expected that most especially heinous, atrocious or cruel murders will have been committed with utter disregard for human life, see, e.g., *Tison v. Arizona*, 481 U.S. 137 (1987), the converse is not always true as Creech's earlier crimes illustrate, See *Creech*, 670 P.2d at 475.

The Ninth Circuit Court of Appeals did not find that the "utter disregard" factor was wholly invalid but held instead that the Idaho Supreme Court's limiting construction gave "no more guidance than the statute." 947 F.2d at 884. This conclusion was based on the panel's inability to understand clearly "what constitutes the highest, the utmost, callous disregard for human life," the terms used by the state court to define the scope of the statutory provision. Observing that this Court had found in *Maynard v. Cartwright*, 486 U.S. 356 (1988) that the word "especially" did little to explain to a *jury* the meaning of "heinousness", the Court of Appeals concluded that it had found an applicable rationale by which *Maynard v. Cartwright* could be made to stand for the proposition that Idaho's limiting construction was not sufficient in a *judicial* sentencing setting. Because the word "especially" does not guide a jury in limiting its application of "heinousness", the court of appeals appears to have reasoned,

it follows that terms like "highest, utmost disregard for human life" and "cold-blooded pitiless slayer" could not be helpful to a legally trained sentencing judge whose responsibility is to rationally distinguish between the worst murders and those that are not quite so aggravated. This logic, unfortunately, confuses the reach of an adjective of uncertain meaning (heinousness) with that of a description of a state of mind (cold-blooded, pitiless, callous) easily understandable to a reasonable person. The court's construct suggests the unsupportable conclusion that *Cartwright* condemns all definitional usages that leave it to a sentencing judge to employ any measure of discretion in separating "ordinary" murderers from those whose crimes are so cold-blooded as to be, with reasonable consistency, found deserving of the death penalty.

Indeed, the Court of Appeals, relying on *Godfrey v. Georgia*, 446 U.S. 420 (1980), held that subjective statutory terms must be clarified by making them referable to definite acts[1] such as "torture or physical abuse" or the

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[1] Petitioner finds it difficult to understand how a court that finds unclear the meaning of the terms "cold-blooded pitiless slayer" and "utmost callous disregard for human life" nonetheless knows exactly what "infliction of mental anguish" means or is, at least, willing to accept that another court does. 947 F.2d at 884. The judges of the court of appeals who dissented from the order denying a hearing en banc had the same difficulty. As Judge Trott wrote:

> Idaho's "utter disregard" factor as focused by Osborn is indistinguishable from the aggravating circumstance approved by the Supreme Court in Walton . . . How "objective" is "relishing the murder,

(Continued on following page)

strikingly specific "infliction of mental anguish." These and similar terms were described in *Walton* as components of Arizona law with which the Arizona Supreme Court had "sought to give substance to the operative terms." *Walton*, 111 L.Ed.2d at 529. They were not identified as prerequisites to valid limitations on facially vague factors. Instead, the Court explained that a limiting definition such as that approved in Maynard v. Cartwright could not be considered the only one that would be constitutionally acceptable. The Court went on to state that it could not fault the Arizona court's limiting definition that "a crime is committed in a 'depraved' manner when the perpetrator 'relishes the murder, evidencing debasement or perversion,' or 'shows an indifference to the suffering of the victim and evidences a sense of

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evidencing debasement or perversion"? How is that different from evidencing an "utter disregard for human life," defined as intentional, cold-blooded, and without pity, and as requiring more than just mass murder, murder for hire, and endangering many people? This is not just "wicked and vile," as in Maynard v. Cartwright, 486 U.S. 356, 362 (1988), which are simply pejorative adjectives that broadly describe the crime. This is "utter, callous, cold-blooded, and pitiless disregard for human life," which is a standard that can be proved with facts and circumstances. "Cold-blooded" means carried out without feeling or emotion. "Pitiless" means without compassion for suffering. Contrary to the panel's assertion, Idaho does not call for a purely "subjective determination" of whether a defendant is a "cold-blooded, pitiless slayer." Idaho requires an evidentiary determination supported by facts and circumstances. 947 F.2d at 890, Trott, J., dissenting.

pleasure in the killing" because such definitions, though not mathematically precise, give meaningful guidance to the sentencer. *Walton, Id.* The guidance furnished by these terms is of precisely the same character as that provided by the Idaho Supreme Court's *Osborn* limiting construction. The sentencer in Arizona must look at the evidence of the defendant's acts and decide whether it furnishes a basis for the inference that the killer "relished the murder" or was "indifferent to the suffering of the victim" and "evidenced a sense of pleasure" in the killing. In the instance of Idaho's "utter disregard" factor, the sentencer must make judgments that are only semantically, but not substantively, different. "Cold-bloodedness" and "utmost callousness" cannot be more difficult to gauge accurately that "relishing" or "evidencing a sense of pleasure in killing." As Judge Trott observed, the Court of Appeals has "effectively established a standard for Idaho more exacting than the one established for Arizona." 947 F.2d at 893.

Idaho's "utter disregard" factor is not the only statutory aggravating circumstance among those being used in the States that requires the sentencing authority to make an assessment of cold-bloodedness or cold calculation. Florida authorizes the death penalty on a finding that a murder was committed "in a cold, calculated and premeditated manner without any pretense of moral or legal justification." Fla. Stat. § 921.141(5)(i). The Florida Supreme Court has interpreted the statute to require a "heightened" degree of premeditation and has upheld the factor as thus limited. *Brown v. State*, 473 So.2d 1260 (1985) (advance planning, such as in contract killings furnishes an example.) Florida's application of this factor

has been upheld by the Court of Appeals for the Eleventh Circuit, which observed that " . . . while the line between 'ordinary' premeditation and the 'heightened' cold, calculated premeditation is a thin one, petitioner has not shown that the state has applied this factor in an unconstitutionally arbitrary manner." *Harich v. Wainwright*, 813 F.2d 1082 (11th Cir. 1987). See also; *Henderson v. Dugger*, 925 F.2d 1309 (11th Cir. 1991) Florida's "cold, calculated and premeditated" factor is plainly no more objective than the "utter disregard" factor, as limited by the Idaho court. There is no reason to believe that Florida death sentencing decisions based on the factor have been systematically arbitrary.

In *People v. Lucas*, 548 N.E.2d 1003 (Ill. 1989) the Illinois Supreme Court, distinguishing *Cartwright*, held that the term "especially brutal or heinous, indicative of wanton cruelty" was sufficiently narrow because the term "especially brutal or heinous" was modified by the requirement for a showing of "wanton cruelty." These terms are surely no easier to apply than those used by the Idaho Supreme Court to limit the state's "utter disregard" factor. Moreover, Florida and Illinois use the definitions mentioned above to instruct juries rather than judges in the meaning of aggravating factors.

The Eighth Circuit has invalidated a Nebraska court's construction of one of its state's aggravating circumstances. The Nebraska Supreme Court had defined "exceptional depravity" to mean a state of mind "totally and senselessly bereft of regard for human life." The definition is comparable to utter disregard for human life viewed as objective evidence of depravity. The Nebraska limitation was held in *Moore v. Clark*, 904 F.2d 1226 (8th

Cir. 1990), cert. den. (1992) to be violative of the *Godfrey* requirement for suitable limitations on the applicability of an aggravating factor. The fault of *Moore* is that it seems to read *Godfrey*, as the Ninth Circuit did, to require the complete elimination of subjectivity in capital sentencing. The decision does not defer to the discretion left to the states to define the circumstances that will authorize the death penalty. Both *Moore* and the Ninth Circuit's decision below provide a review standard even worse in terms of subjectivity than the statutes they struck down, with the result that a subjective but workable statutory definition is invalidated by the totally subjective view of a federal court. *Moore*, it should be noted, does not discuss the Nebraska judicial sentencing system and makes no effort to reconcile its result with *Walton*.

B. Idaho's System Of Judicial Sentencing And Independent Appellate Review Provides Safeguards To Insure That Aggravating Circumstances Will Be Applied In Constitutionally Narrow Fashion.

The Court of Appeals invalidated Idaho's "utter disregard" factor by concluding that not only was the factor vaguely construed, but that a valid construction suggested by the state had not been applied. In doing so, the court apparently assumed that neither the sentencing judge nor the state supreme court was aware of the constitutional requirement for guided discretion and the body of case law that gives meaning to the requirement. The court's error is the predictable result of the fact that it

wholly overlooked *Walton's* discussion of *judicial* sentencing systems and the inapplicability of the *Godfrey/Maynard* rationale in such settings.

> When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face. That is the import of our holdings in Maynard and Godfrey. But *the logic of those cases has no place in the context of sentencing by a trial judge.* Trial judges are presumed to know the law and to apply it in making their decisions. If the Arizona Supreme Court has narrowed the definition of the "especially heinous, cruel or depraved" aggravating circumstance, we presume that Arizona trial judges are applying the narrower definition. It is irrelevant that the statute itself may not narrow the construction of the factor. Moreover, even if a trial judge fails to apply the narrowing construction or applies an improper construction, the Constitution does not necessarily require that a state appellate court vacate a death sentence based on that factor. Rather, as we held in Clemons v. Mississippi, 494 U.S. ___, (1990), *a state appellate court may itself determine whether the evidence supports the existence of the aggravating circumstance as a properly defined* or the court may eliminate consideration of the factor altogether and determine whether any remaining aggravating circumstances are sufficient to warrant the death penalty. *Walton,* 111 L.Ed.2d at 528 (emphasis added)

The possible breadth of statutory aggravating factors is not the only consideration important in evaluating the

capacity of a particular sentencing system to avoid arbitrary results. The Idaho Supreme Court has held that the state's death penalty statutes impose upon it the responsibility to independently review death sentences imposed in the trial courts of the state. In *State v. Osborn, supra,* the state's high court held that it would comprehensively review death sentences independently of errors raised on appeal and that its sentence review would not be restricted by rules generally requiring the preservation of issues in the trial court because the state's statutes compel review "irrespective of the defendant's contentions, if any." 631 P.2d at 192. The statute requires the court to consider whether the sentence of death was arbitrarily imposed, whether the evidence supports the trial court's finding of aggravating circumstances and whether the sentence of death in a particular case is excessive or disproportionate. Idaho Code § 19-2827. By rule, the court has prescribed a form to be followed by trial courts in cases where the death penalty may be authorized. The trial court is instructed to state aggravating factors found and to state the reasons why the death penalty was or was not imposed. Rule 33.1, Idaho Criminal Rules. In Creech's case the court observed that Creech experiences no remorse for his actions, had committed murder at least four times previously and had, in letters to law enforcement officials, detailed "numerous alleged murders beyond those for which he has already been convicted and . . . [his] intentions to kill in the future." *Creech,* 670 P.2d at 472. The court concluded that Creech was "remoreseless, calculating and cold-blooded." *Id.* at 476. The Court of Appeals did not credit these conclusions though *Walton* required that it do so.

The Idaho Supreme Court's independent review of capital cases is effectively *de novo* and the court considers not only whether the trial court's findings of aggravating factors are supported by sufficient evidence, but also whether to accept the penalty as proportionate and just. In *State v. Scroggins,* 716 P.2d 1152 (Idaho 1985), which concerned the senseless killing of a young girl by Scroggins and an accomplice, the court overturned Scroggins death sentence in the exercise of its power in independent review:

> Our review of a death sentence is qualitatively different than our review of an ordinary criminal sentence which is subject to review in this court on an abuse of discretion standard. [citations omitted] . . . [W]ith a death sentence I.C. § 19-2827(a) requires this court to make an independent review of the sentence on the record, and the abuse of discretion standard which otherwise applies in criminal sentencing is not applicable.
>
> . . . [W]e conclude that the sentence of death is excessive and disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.
>
> We have painstakingly considered the record, and in so doing, have focused not only on the crime and the circumstances surrounding its commission but on the age, characteristics, and personal involvement of *this* defendant. 716 P.2d at 1159.

The court found Scroggins less culpable than his accomplice, who was also sentenced to death, *State v. Beam,* 710 P.2d 526 (Idaho 1985), based on considerations such as

youthful immaturity and its view that Scroggins had not committed the acts that directly caused the child's death. In reaching this conclusion, the Idaho Supreme Court necessarily held that the sentencing judge's factual conclusions about Scroggins' personal culpability were incorrect.

Similarly, in *State v. Windsor,* 716 P.2d 1182 (Idaho 1985), the state supreme court set aside a death sentence in a case where the court found the defendant to be less culpable than her accomplice. The court found that Windsor was not the actual killer, may not have intended that the killing occur, and had no past record of violent conduct. Windsor and Donald Fetterly, see *State v. Fetterly,* 710 P.2d 1202 (1985), broke into and burglarized the home of an acquaintance. They then lay in wait for the owner to return and, when he did, tied him and Windsor placed duct tape over his face in a manner that would have caused him to suffocate had not Fetterly first stabbed him to death. Again, the Idaho Supreme Court necessarily substituted its own conclusion about the defendant's culpability for that of the trial judge.

In two cases, the Idaho Supreme Court vacated death sentences in order to obtain clarification from trial courts about the certainty of decisions in favor of the death penalty. In one case it was unclear whether the trial court would have imposed the death sentence in the absence of an erroneous factual finding supporting the "utter disregard" factor. *State v. Charboneau,* 774 P.2d 299 (Idaho 1989). In the other, the court was uncertain whether the trial judge was fully aware of his discretion *not* to impose a death penalty. *State v. Leavitt,* 775 P.2d 599 (1989), after resentencing, 822 P.2d 523 (1991) rehearing denied (1992).

In *Charboneau*, the state appellate court could probably have upheld the death sentence on the basis of remaining aggravating factors, but since it was remanding the case the court chose not to consider whether the remaining factor was supported by sufficient evidence. *Clemons v. Mississippi*, 494 U.S. 738 (1990) holds that a state reviewing court may, upon finding one of multiple aggravating factors to be deficient, either reconsider whether the factor, properly applied is sufficiently supported by the evidence or may itself determine that remaining circumstances are enough to support the death penalty. See also *Walton, supra; Cabana v. Bullock*, 474 U.S. 376 (1986). Petitioner does not understand these cases to mean that a state appellate court must either always remand or always itself independently consider the appropriateness of the death penalty when it finds a deficiency in the way sentence was imposed in the trial court. See *Sochor v. Florida*, No. 91-5843, June 8, 1992. ("While federal law does not require the state appellate court to remand for resentencing, it must, short of remand, either itself reweigh without the invalid aggravating factor or determine that weighing the invalid factor was harmless error." Slip. op. at p. 4)

State law in Idaho contemplates that where one of multiple aggravating factors fails the appellate court may remand for additional proceedings, particularly where to do so may enhance the accuracy of the sentencing process, *Charboneau, supra; Leavitt, supra; Osborn, supra*. On the other hand, if the supreme court is satisfied that nothing is to be gained by a remand, it may itself determine that the death penalty is appropriate notwithstanding that one of several aggravating factors has been called

into question. This aspect of the review process has been simplified by the court's decision in *Charboneau* which instructs sentencing judges to specify whether aggravating factors found are individually sufficient to support the death penalty. This was accomplished by requiring that all mitigation be considered against each aggravating factor found. Since *Charboneau* was decided, it has been typical for sentencing judges to state that each aggravating factor found stands alone against all mitigating evidence presented, if that is the case.

Thus, in *State v. Card*, 825 P.2d 1081 (Idaho 1991), where the sentencer had found aggravating factors of multiple murder and utter disregard for human life, the Idaho Supreme Court declined to follow the decision of the Ninth Circuit in *Creech*, finding that the multiple murder aggravating factor was sufficient by itself to sustain the death penalty. The Idaho Supreme Court did not expressly state that it had "reweighed" the remaining factor, see *Sochor*, but Idaho is not a "weighing" state as that term is defined in *Clemons v. Mississippi*, 494 U.S. 738 (1990) and it was not required to do so.

A state's decision about how its sentencing system will operate must be its own, subject to the requirement that it provide a means for distinguishing those who should be sentenced to death from those who should not. *Cabana, supra*. In this regard, as this Court has observed, it is

> important to note that state supreme courts in States authorizing the death penalty may well review many death sentences and that typical jurors, in contrast, will serve on only one such case during their lifetimes. [citation omitted]

> Therefore we conclude that state appellate courts can and do give each defendant an individualized and reliable sentencing determination based on the defendant's circumstances, his background and the crime. *Clemons*, 494 U.S. at 749.

Because Idaho's sentencing procedure includes independent review by the state supreme court, the Ninth Circuit erred by its focus on language used by the trial court in its findings, an error which implicates the power of a federal appeals court over state sentencing decisions.

C. Idaho's Courts Have Applied the "Utter Disregard" Circumstance In Constitutionally Narrow Fashion.

A different panel of the Court of Appeals has recognized that the sufficiency of a state's death sentencing procedure depends on all the circumstances relevant to the way the state administers its system.

> [In Walton] the Court held that facial vagueness alone does not decide the question: One must look beyond the language of the suspect provision and consider the full circumstances attending its application. Safeguards built into the sentencing scheme through other provisions – and even extra-statutory procedural safeguards – may preserve the scheme's constitutional integrity. *Richmond v. Lewis*, 948 F.2d 1473, 1483-1484 (9th Cir. 1992), cert. granted, 112 S.Ct. 1557 (1992).

The best evidence that Idaho's utter disregard factor is not so broad that it operates simply as a catch-all for murders not covered by other aggravating circumstances

lies in the fact that the utter disregard circumstance has been applied in a narrow, consistent fashion. In every case in which the Idaho Supreme Court has upheld a death sentence based wholly or in part on a finding of utter disregard for human life, the defendant had acted without conscientious scruple against killing. Each such murder could be characterized as cold-blooded because the defendant acted with no significant provocation, without emotion or killed for mere convenience such as to destroy a witness to a crime. For example, in *State v. Paradis*, 676 P.2d 31 (Idaho, 1983), cert. den. 468 U.S. 1220 (1984), and *State v. Gibson*, 675 P.2d 33 (Idaho 1983) cert. den. 468 U.S. 1220 (1984) (related cases), the defendants brutally murdered an acquaintance in Spokane, Washington, probably because he had questioned Gibson and Paradis about stolen guns. The victim's girlfriend, Kimberly Palmer, was present. Gibson and Paradis placed Palmer in a van, drove her into Idaho, and strangled her to death.

Both defendants were sentenced to death. The "utter disregard" factor was the only statutory aggravating circumstance found.

In *State v. Sivak*, 674 P.2d 396 (1983), the defendant entered a service station with an accomplice and murdered the attendant by stabbing and shooting her several times. Sivak had previously worked at the gas station, "was known to the victim, had expressed animosity toward her and had called to inquire who would be on duty at the station" the day of the attack. *Sivak*, 674 P.2d at 398. Sivak's act of callous, planned murder for no good reason is an objectively observable example of utmost callousness and cold-bloodedness.

The utter disregard factor has been applied to the senseless and unprovoked murder of children (*State v. Beam*, 710 P.2d 526 (Idaho 1985); *State v. Scroggins*, 716 P.2d 1152 (Idaho, 1985); *State v. Fain*, 774 P.2d 252 (Idaho 1989)), and to a child abuse murder where the defendant had previously threatened his infant victim, killed the child with injuries difficult to achieve, had previously expressed dislike for the child and was calm after the attack and refused to assist the victim, *State v. Aragon*, 690 P.2d 293 (Idaho 1984), rehearing denied (1984), but not where such evidence was lacking. *State v. Padilla*, 620 P.2d 286 (1980). In *State v. Fetterly*, 710 P.2d 1202 (Idaho 1985), rehearing denied (1986), cert. den. 479 U.S. 870 (1986), Fetterly and his girl friend waited for the victim of their crime in his home. They had broken in for the purpose of committing a burglary, but the burglary could have been quickly accomplished. When the victim returned home, he was bound, his face was covered with duct tape and he was stabbed to death by Fetterly. See also, *State v. Windsor*, 716 P.2d 1182 (Idaho 1985) (companion case). In *State v. Paz*, 798 P.2d 1 (Idaho 1990), the defendant, after a relatively minor argument in a restaurant, finished his meal, walked to his automobile and obtained a semi-automatic weapon, and returned to the restaurant where he shot into a room containing numerous people, killing the person with whom he had argued. Three cases involved casual robberies with wholly gratuitous killings of multiple victims. *State v. Pizzuto*, 810 P.2d 680 (Idaho 1991), cert. den. ___ U.S. ___ (1992); *State v. Lankford*, 747 P.2d 710 (Idaho 1987), vacated on other grounds, sub nom *Lankford v. Idaho*, 114 L.Ed.2d 173 (1991); *State v. Lankford*, 781 P.2d 197 (Idaho 1989).

In reviewing the utter disregard cases, the Idaho Supreme Court has vacated three judgments based in whole or in part of utter disregard findings. In *State v. Windsor*, 716 P.2d 1182 (Idaho 1985), and *State v. Scroggins*, 716 P.2d 1152 (Idaho 1985), the court found the sentences to be excessive even though the utter disregard factors had been proved. In *State v. Charboneau*, 774 P.2d 299 (Idaho 1989), the Idaho Supreme Court did not find that the evidence clearly supported the utter disregard finding.

That the Idaho courts have not used the utter disregard factor in an overbroad fashion is more dramatically demonstrated by the numerous cases in which, though there was an evidentiary basis for finding the factor, the death penalty was not imposed. In *State v. Searcy*, 798 P.2d 914 (Idaho 1990), the defendant carefully planned to rob a grocery store after hours. He hid himself in the back storage room of the store. When the victim went to the back room to place the day's receipts in the safe, Searcy shot her in the stomach and told her that he would call an ambulance if she opened the safe. When the victim opened the safe, Searcy put his gun to her head and killed her. Potential mitigating factors included the circumstances that the defendant was relatively young (20 years), chemically dependent, and suffered delayed growth syndrome. For a similar case, see *State v. Cambron*, 798 P.2d 469 (Id.App. 1990). In *State v. Wages*, 810 P.2d 272 (Id.App. 1991),[2] the defendant was involved in the murder of a

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[2] Cases decided by the Idaho Court of Appeals generally do not discuss the state's death penalty aggravating factors. The Court of Appeals has no jurisdiction over such cases. Nonetheless, many of the murder cases decided by the Idaho Court of Appeals are reflective of the sparing use of the utter disregard factor in Idaho law.

potential drug prosecution witness. The victim was stripped, tied to a tree, physically abused, then stabbed to death. The death penalty was not imposed on Wages. He was considered less culpable than other participants in the crime, was addicted to drugs and alcohol, seemed to be remorseful, and had cooperated with the police. In *State v. Winn*, 828 P.2d 879 (Idaho 1992), a mother who poisoned her child to death, claiming instructions from a demon, was spared the death penalty, inferably because of mitigating evidence of mental condition. Other examples of the reluctance of courts to find the utter disregard factor, or of prosecutors to press the issue, are numerous.[3]

In sum, Idaho trial courts have not applied the utter disregard factor in a broad or meaningless way. Idaho's death penalty decisions are the result of an appropriately narrow application of aggravating circumstances.

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[3] See e.g., State v. Beam, 706 P.2d 1342 (Idaho 1985); State v. Caudill, 706 P.2d 456 (Idaho 1985); State v. Bainbridge, 698 P.2d 335 (Idaho 1985); State v. Hoffman, 701 P.2d 668 (Id.App. 1985); State v. Johns, 736 P.2d 1327 (Idaho 1987); State v. Hawkins, 769 P.2d 596 (Idaho 1989); State v. Smith, 792 P.2d 916 (Idaho 1990); State v. Rodgers, 812 P.2d 1066 (Id.App. 1990); State v. Enno, 807 P.2d 610 (1991); State v. Broadhead, 814 P.2d 401 (Idaho 1991); State v. Romero, 815 P.2d 453 (Idaho 1991); State v. Major, 665 P.2d 703 (1983); State v. Griffith, 610 P.2d 522 (Idaho 1980); State v. Stormoen, 645 P.2d 317 (Idaho 1982); State v. Olin, 648 P.2d 203 (Idaho 1982); State v. Anderson, 700 P.2d 76 (Id.App. 1985); State v. LePage, 630 P.2d 674 (Idaho 1981); State v. Mitchell, 660 P.2d 1336 (1983), cert. den. 461 U.S. 934 (1983); State v. Brewer, 1992 W.J. 140939 (Id.App. 1992).

D. The Court Of Appeals Exceeded Its Power To Review State Court Judgments In Habeas Proceedings.

In the method by which the Ninth Circuit Court of Appeals reviewed the Idaho Supreme Court's determination upholding the "utter disregard" aggravating circumstance in Creech's case the court failed to recognize the limitations on its power to overrule such a determination. In *Lewis v. Jeffers*, 111 L.Ed.2d 606 (1990), this Court stated:

> Our decision in *Walton* . . . makes clear that if a state has adopted an constitutionally narrow construction of a facially vague aggravating circumstance, and if the State has applied that construction to the facts of the particular case, then the "fundamental constitutional requirement: of channeling and limiting . . . the sentencer's discretion in imposing the death penalty," Cartwright, 486 U.S., at 362, has been satisfied. 111 L.Ed.2d at 622.

Notwithstanding the constitutional sufficiency of Idaho's narrowing construction, by the rationale of *Walton*, and as tested by the manner in which the Idaho court has reviewed death sentences, the Court of Appeals held against the statute by misinterpreting the trial court's findings. It ignored altogether the independent review function of the Idaho Supreme Court. Pointing to language in the sentencing findings to the effect that the victim had initiated an attack on Creech and that the murder "evidenced an excessive violent rage," the Court of Appeals stated that it could not agree that the facts showed that Creech was a "cold-blooded, pitiless killer." 947 F.2d at 884. The court then observed that if the "utter

disregard" language was meant to apply only to calculated murders, it had been misapplied:

> In its briefs, the state argues that "utter disregard" is sufficiently specific, as it applies only to calculated murders. According to the State, "[M]urders that result from a strong provocation or objectively reasonable emotional distress are not comprehended by [the section]." If this is what the limiting construction means, then it was improperly applied to Creech. While the state argues that "Creech cold-bloodedly contrived the murder of David [sic] Jensen," this was not the finding of the trial court. . . . *Creech v. Arave*, 947 F.2d at 884-885, n.16.

And what of the determination of the Idaho Supreme Court that Creech was "remorseless, calculating and cold-blooded," had committed four previous murders, confessed to many others and announced that he intended to keep on killing in the future, 670 P.2d at 476? All reference to this holding was omitted in favor of calling attention to a non-dispositive remark by the Idaho Supreme Court that the district judge did not find that the murder had been performed on contract or by plan. 947 F.2d at 885.

The sentencing judge's findings were not as lexically precise as they might have been, but read in context they leave little doubt of his meaning. Although there was uncontradicted evidence that Creech engineered an attack on Dale Jensen in order to create a pretext for killing him, see transcript of deposition of Keith George, Exhibit E, supplemental excerpt of record, Court of Appeals; Exhibit W, supplemental excerpt of record,

Court of Appeals, pp. 79-83 (preliminary hearing transcript), Judge Newhouse listed Jensen's attack as a mitigating factor, justifying a "protective" response. Findings, JA p. 32 Even with Judge Newhouse's generous interpretation of mitigation, it was clearly his view that the murder was cold-blooded and calculated. His findings included the following:

> (a) . . . The victim was a young, inexperienced, handicapped man.[4] He had both physical and mental impairments.
>
> (c) . . . The victim, once the attack commenced was under the complete domination and control of the defendant. The murder itself was extremely gruesome evidencing an excessive violent rage.[5] *With the victim's attack as an excuse*[6], the defendant's murder then took on many of the aspects of an assassination. These violent actions went well beyond self-defense.
>
> (d) . . . The defendant indicates an intention to commit continued murders in the future, which, based on his record, is extremely probable.

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[4] Jensen was not a violent offender. He was in prison on an automobile theft conviction. State v. Creech, 670 P.2d 463 (Idaho 1983).

[5] It is apparent that the "excessive rage" language refers to the brutality of the attack. This is not inconsistent with Creech's cold-blooded disposition to kill for the sake of killing.

[6] Judge Newhouse seems clearly to have viewed the attack by Jensen as something that served Creech as a mere pretext for the killing.

> (g) . . . During the incident, the defendant was not under the influence of any mind controlling substance. The murder, once commenced, appears to have been an intentional, calculated act.
>
> Findings, JA p. 33

In concluding that the murder had been the product of utter disregard for human life, Judge Newhouse pointed out that Creech had killed his victim after he was completely helpless. Findings, JA p. 34

The Court of Appeals revision of the sentencer's findings and its failure to defer to the independent review function of the Idaho Supreme Court violate governing standards of federal review announced in *Lewis v. Jeffers, supra*. In *Jeffers* the Court held that federal review of a state court's application of a properly narrowed aggravating factor "is limited, at most, to determining whether the state court's finding was so arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation." 111 L.Ed.2d at 622. To determine the issue, the Court held that the "rational fact-finder" standard of *Jackson v. Virginia*, 443 U.S. 307 (1979) would apply.

A state court's finding of an aggravating circumstance

> in a particular case – including a *de novo* finding by an appellate court that a particular offense is "especially heinous" or "depraved" – is arbitrary or capricious if and only if no reasonable sentencer could have so concluded." *Jeffers*, 111 L.Ed.2d at 624.

This principle applies equally to the application of aggravating circumstances by a sentencing judge and the determinations of a state appellate court that conducts an independent review of the evidence. In both cases "the underlying question remains the same: If a State's aggravating circumstances adequately perform their constitutional function, then a state court's application of those circumstances raises, apart from due process and Eighth Amendment concerns, only a question of the proper application of state law." *Id.*

If petitioner is correct in its position that Idaho's "utter disregard" factor has been constitutionally narrowed and applied, the Court of Appeals' judgment that the state courts misapplied the factor is a decision on a matter of state law in excess of the authority of the court. The facts of Creech's crime are such that a rational fact-finder would be obligated to conclude that he acted with utter disregard for human life.

II.

The Court of Appeals Exceeded the Scope of Federal Habeas Review By Its Holding that Creech Was Entitled to Relief Because the Sentencing Court Had Not Made Express Findings of the Existence of Particular Factual Components of a Statutory Aggravating Circumstance.

A murder committed by a person already under a sentence for murder or the murder of a prison inmate by another inmate is defined by Idaho Code section 18-4003(c) and (e) as a murder of the first degree. Such a murder is a capital offense if the state proves additionally that "it was accompanied with the specific intent to cause

the death of a human being." Idaho Code, section 19-2515 (g)(7). The sentencing judge found that this aggravating circumstance had been proved beyond a reasonable doubt. Findings, JA p. 33. Moreover, the concluding paragraphs of the judge's formal findings contained the statement that "this defendant intentionally destroyed another human being at a time when he was completely helpless." Findings, JA p. 34. The Idaho Supreme Court, in response to Creech's argument that the trial court erred in finding the aggravating circumstances beyond a reasonable doubt, held that the evidence clearly supported the trial court's findings. *Creech*, 670 P.2d at 467.

The Court of Appeals, however, held that the trial court had not made a required finding that component facts of an aggravating circumstance had been proven:

> We find that there is evidence by which Judge Newhouse could have concluded that Creech had specific intent. At the time he pleaded guilty, Creech admitted that he intended to kill Jensen. Nevertheless, Judge Newhouse's findings fail to indicate that found specific intent beyond a reasonable doubt before applying section 19-2515 (g)(7). On remand, the district court shall grant the petition. The writ shall order Creech's release if the state judge at resentencing applies the aggravating circumstances under this section without a finding of specific intent. *Creech v. Arave*, 947 F.2d at 882.

No legal rationale was offered in support of this holding, nor was any authority cited. The Court of Appeals may have thought that some unidentified federal right entitled Creech to have Judge Newhouse's intent

finding appear alongside his references to the aggravating factors found instead of on a separate page. The court may have believed that the words "intentionally destroyed" imply something different than "with intent to kill". In any case, the court was wrong. The procedure for communicating findings to a state reviewing court is a matter of state law. In an analogous situation, the Idaho Supreme Court held that it would not compel the sentencing court to make written findings explaining its application of the *Osborn* limiting construction to the "utter disregard" factor because neither *Osborn* nor the statute contained such a requirement. *State v. Sivak*, 674 P.2d 396 (Idaho 1983).

Likewise, whether a state court must make express findings of the facts implicit in a particular holding is not a question open to federal review.[7] In *Lewis v. Jeffers, supra*, the Court held that whether an aggravating circumstance exists is a question of state law, not cognizable in federal habeas courts, even if the determination could be considered a mixed question of law and fact. *Wainwright v. Witt*, 469 U.S. 412 (1985), in which it was argued that the presumption of correctness under 28 U.S.C. section 2254 did not apply to an implied factual finding of juror bias, holds that a state court is not obliged to detail for the record facts necessarily included in a holding:

> We decline to require the judge to write out in a separate memorandum his specific findings on each juror excused. A trial judge's job is difficult enough without senseless make-work. Nor do

---

[7] A related issue has been raised in Richmond v. Lewis, cert. granted, No. 91-7094.

> we think under the circumstances that the judge was required to announce for the record his conclusion that juror Colby was biased, or his reasoning. The finding is evident from the record. 469 U.S. at 430.

Cf. *Knaubert v. Goldsmith*, 791 F.2d 722 (9th Cir. 1986) (Not every fact supporting a state court finding "need be stated on the record in infinite detail and clarity. In certain circumstances we will recognize that a factual determination is implicit in the actions taken by a state court.")

Judge Newhouse's finding that the (g)(7) aggravating factor of intent to kill had been proved beyond reasonable doubt necessarily implied that the component facts had been found, just as the Idaho Supreme Court's holding that the aggravating factors were supported by sufficient evidence necessarily raises the same implication. The only observable way around this implication would be to assume that the state judges might not have known what the law required, thus necessitating a direct expression capable of demonstrating to a federal court that the provisions of state law were known and had been observed. This assumption, however, is not open to a federal habeas court. *Walton, supra; Witt, supra.*

The Court of Appeals holding is little more than instruction on how the state court should have written its opinion. This Court, however, has said that it "will not impose on state courts the responsibility for using particular language in every case in which a state prisoner presents a federal claim . . . in order that federal courts might not be bothered with reviewing state law and the record in the case." *Coleman v. Thompson*, 115 L.Ed.2d 640, 662 (1991).

The Ninth Circuit was required to accord a presumption of correctness to the state factual findings, express and implicit. *Burden v. Zant*, 112 L.Ed.2d 962 (1991). It did not do so. Instead, it revised the findings by excising the sentencing court's express reference to Creech's intent to kill.

Furthermore, the Court of Appeals was required to refrain from deciding questions of state law. *Jeffers, supra; Estelle v. McGuire*, 116 L.Ed.2d 385 (1991) ("We reemphasize that it is not the province of a federal habeas court to reexamine state court determinations on state law questions." 116 L.Ed.2d at 396.) It did not do so. Instead the Court of Appeals intruded upon the State's enforcement power without even as much as a pretextual legal justification.[8]

III.

The Court of Appeals Erred By Holding That A Remand During Appeal For The Purpose of Correcting An Error Of State Procedural Law Entitled Creech To A New Sentencing Hearing.

Serious and adverse implications for the finality of judgments arise from the holding of the Court of Appeals

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[8] Although it is somewhat unclear because the Court of Appeals did not explain the legal basis for its holding, the state has assumed that the court mistakenly ruled on a question of state law rather than announcing a new rule of federal law. If the holding could be viewed as one based on federal law, it would be precluded in Creech's case by the "new rule" doctrine of Teague v. Lane, 489 U.S. 288 (1989). See also: Stringer v. Black, 117 L.Ed.2d 367 (1992).

that Creech was entitled to a second sentencing hearing when the Idaho Supreme Court temporarily remanded his case for the purpose of correcting a procedural error. See *Creech v. Arave*, 947 F.2d at 881-882.

It is important to bear in mind that Creech was afforded a full hearing on matters in aggravation and mitigation. Evidence was offered by both Creech and the State. A presentence report was prepared and submitted. The trial judge took judicial notice of the entire case file and the presentence report. *Creech*, 670 P.2d at 466. At the conclusion of these proceedings, the judge took the case under advisement and some time later executed a written document detailing the court's findings and announcing its judgment. *Id.* During the pendency of Creech's appeal in the Idaho Supreme Court, and before any action had been taken to decide the case, the court remanded the case with instructions to pronounce sentence in open court in the presence of the defendant. *Id.*, n.1 The order of remand stated that pronouncement of sentence in the absence of the defendant and his attorney violated a state statute. Order, JA pp. 38-39 The supreme court also ordered that the trial judge comply within fourteen days, which suggests that the court did not seriously expect that a new sentencing hearing would be conducted. *Id.* In the meantime, the supreme court retained appellate jurisdiction. In a footnote to its ultimate opinion, the court explained that it had remanded the case "for the imposition of such sentence as the district judge might find just and appropriate to be imposed upon Creech in open court with Creech and his counsel present," noting that Idaho Code section 19-2503 and a court rule required pronouncement of sentence in the defendant's presence. 670 P.2d at 466, n.1.

When the case was returned to Judge Newhouse, Creech demanded a new sentencing hearing, which was denied. The Court of Appeals granted relief on this ground, holding that *Lockett v. Ohio*, 438 U.S. 586 (1978), *Eddings v. Oklahoma*, 455 U.S. 104 (1982) and *Skipper v. South Carolina*, 476 U.S. 1 (1986) required that a defendant be allowed to offer mitigating evidence of his post trial behavior in confinement. 947 F.2d at 873.

Lockett and *Eddings* stand generally for the unexceptionable proposition that one accused of a capital crime must be permitted to offer all relevant evidence in mitigation at the sentencing phase of his case. *Skipper* did not alter this principle by its holding that evidence of a defendant's behavior while incarcerated awaiting trial was relevant to the question of what sentence should be imposed.[9]

The decision below cites *Skipper* for a very different principle than the case announced. *Skipper* is concerned with the relevance of the defendant's behavior in jail to the traditional sentencing issue of character. The Court of Appeals read the case to mean that Creech was entitled to demand that a *revision* of his sentence be considered because he had been incarcerated and therefore might have been able to produce evidence of his prison conduct

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[9] If the Court of Appeals decision were viewed as an extension of the precedent set by Skipper, the new rule would not be available to Creech. Teague v. Lane, supra; Stringer v. Black, supra. The court's holding, however, is not an extension of Skipper. It is a misreading of the case which is inconsistent with its rationale. The decision below, therefore, does not announce a bona fide rule at all.

capable of changing the sentencer's mind about the death sentence. If *Skipper* meant this, a capital prisoner would be entitled to insist on periodic sentencing reviews in order to present evidence of his prison conduct and it would never be possible to execute a sentence of death. The rule could not properly be limited to those fortuitous cases where the defendant is granted a hearing on some procedural ground. If there is a constitutional right to sentence reconsideration for the purpose of evaluating prison conduct, presumably its applicability could not be restricted to cases where the defendant obtains a remand for the purpose of having the sentence announced in his presence.

Skipper, however, is limited to insuring that a prisoner is entitled to present all relevant evidence at his original sentencing hearing, or in a case where he is granted a full resentencing. This was the view of the Ohio Supreme Court in *State v. Davis,* 63 Ohio St.3d 44 (1992).[10] Davis was granted a new hearing before an Ohio sentencing panel "solely for the purpose of determining whether [a] remaining aggravating circumstance outweighs the mitigating factors presented . . . beyond a reasonable doubt. *State v. Davis,* 528 N.E.2d 925, 936 (1988). Davis sought to have the panel consider evidence of his post trial prison conduct, but it refused to do so. On appeal, the Ohio Supreme Court upheld the panel decision:

> In the case at bar, no relevant mitigating evidence was excluded from consideration by the panel during the mitigation phase of appellant's

[10] A petition for a Writ of Certiorari has been filed in this Court sub nom Davis v. Ohio, No. 91-8740.

> 1984 trial. All mitigating evidence which was available at that time was duly received and considered by the panel including evidence concerning appellant's ability to adapt to prison life. That same relevant evidence was again received and considered by the panel in 1989 for purposes of resentencing appellant.[11] The evidence excluded from consideration by the panel at appellant's resentencing hearing concerned *post-trial* matters. Under these circumstances, we do not believe that *Skipper* . . . requires that appellant's death sentence be vacated. Here, appellant was not denied the type of individual consideration of relevant mitigating factors required in capital cases. 63 Ohio St.3d at 46.

Creech's theory that he *was* granted a full resentencing hearing depends on *Sivak v. State,* 731 P.2d 192 (Idaho 1986), which was decided after *Skipper* was announced and several years after Creech's appeal was decided by the Idaho Supreme Court. Although the facts of the procedurally based remand in Sivak's case were identical to those of Creech's case, Sivak was granted a new sentencing hearing. The Idaho Supreme Court held that this result was dictated by *Skipper.* Petitioner believes that the state supreme court was in error in this view, for the reasons stated above. *Sivak* does not change the fact that the Idaho Supreme Court finalized Creech's sentence.

The Court of Appeals did not base its decision on the theory that Creech was entitled to a new hearing because such relief had been granted to Sivak under the same

[11] Petitioner understands this to mean that the sentencing panel reconsidered the same evidence it had received previously. See Resp. Brief, Davis v. Ohio, No. 91-8740.

circumstances, nor could it have properly done so. See *Jeffers, supra*. (Habeas corpus does not lie to consider a claim that a state court misapplied its own law.) Instead, the court observed that it was persuaded by *Sivak* that there was "no rational basis for distinguishing the evidence of a defendant's good conduct while awaiting trial and sentencing, and evidence of a defendant's good conduct pending review of a death sentence which is vacated on appeal." 947 F.2d at 882.

Obviously there *is* a rationale basis for making such a distinction in the circumstances of this case. A right given to a defendant convicted of a capital offense to seek modification of a death sentence whenever he wishes to offer evidence of his post-sentencing behavior in jail would unacceptably undermine legitimate expectations in the finality of fully considered judgments.

CONCLUSION

Those aspects of the judgment of the Court of Appeals for the Ninth Circuit relevant to the petitioner's cause herein should be vacated.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1992

A. J. ARAVE, WARDEN,

Petitioner,

v.

THOMAS E. CREECH,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

I.

The Idaho Supreme Court's Limiting Construction Of The "Utter Disregard" Factor Properly Relies On A Constitutionally Acceptable Exercise Of Sentencing Judgment, Employing Terms That Are Not Vague

Whether a state court's limiting construction of an aggravating factor is too vague to give meaningful guidance to the sentencing authority is not settled by the circumstance that the descriptive terms employed may be thought to be subjective. Objective guidance can be given by terms that are less than precise, as is illustrated by the limiting constructions considered in *Walton v. Arizona*, 497 U.S. 639 (1990). For this reason, the Idaho Supreme Court's *Osborn* limiting construction is not unconstitutionally vague because the terms used are subjective in the sense that they require the sentencer to exercise judgment about whether the proven facts establish that the murder was reflective of the "utmost callous disregard for human life" by a "cold-blooded, pitiless slayer." *State v. Osborn*, 631 P.2d 187, 201 (1981). This is especially so when the Idaho Supreme Court took pains to instruct sentencing courts in the state that the phrase "utter disregard for human life" must be interpreted to set capital murders apart from others, citing *Godfrey v. Georgia*, 446 U.S. 420 (1980), and that "utter disregard" could not be proved solely by the existence of another capital aggravating factor.

There is an important distinction between *Maynard v. Cartwright*, 486 U.S. 356 (1988) and *Godrey*, on the one hand, and *Walton*, on the other, that lies in the difference between what Judge Trott called "pejorative adjectives"

and meaningful descriptions of the state of mind of the criminal actor. Words like "heinous," "depraved," and "perverse" are especially lacking in well-understood meaning. "Depraved," for example, is commonly defined as "corrupt, wicked, or perverted," *Webster's Encyclopedic Unabridged Dictionary of the English Language*, p.388, while "heinous" means "hateful; odious; abominable; totally reprehensible." *Id.*, p.658. Such terms do not define a killer's state of mind. Moreover, they derive their meaning from the potentially wide-ranging impressions of the hearer and, for this reason, are particularly difficult to apply when the object is to identify a high degree of culpability in a principled manner. The Idaho Supreme Court, on the other hand, defined "utter disregard for human life" as being "reflective of acts or circumstances surrounding the crime which exhibit the highest, the utmost callous disregard for human life, i.e., the cold-blooded, pitiless slayer." *State v. Osborn*, 631 P.2d 187, 201 (1981). These are not merely pejorative adjectives, they are descriptive of provable states of mind. "Callous" is defined as "a. hardened insensibility: feeling no emotion, b. feeling no sympathy for others: without regard for the feelings or welfare of others: indifferent to the suffering of others." *Webster's Third New International Dictionary, Unabridged*, 1986, p.319. "Cold-blooded" similarly refers directly to the culpability with which the killer acted: "a. marked by absence of warm feelings: without consideration, compunction, or clemency: unfeeling, callous, hardened, cruel, b. matter of fact, emotionless." *Id.* at 442. These characteristics can be proved by facts such as Creech's staging of a pretext to kill Jensen or his brutal battering of Jensen after he was entirely helpless. It is no

more important from the standpoint of principled decision making to limit such proof to a list of specific acts than it would be to so limit proof of such states of mind as malice aforethought or premeditation. This much is acknowledged by the Court's approval of the use of subjective state of mind descriptions to narrow the meaning of the terms "heinous" and "depraved." *Walton, supra.*

The criteria are rational in that they focus the sentencer's attention on attributes of the defendant's state of mind and therefore narrow the decisionmaker's judgment as to whether the defendant's acts cross the death sentencing threshold. *McCleskey v. Kemp*, 481 U.S. 279, 305 (1987). The guided discretion requirement, as the Court has said, does not place totally unrealistic conditions on the use of capital punishment. *Gregg v. Georgia*, 428 U.S. 153 (1976).

II.

The Constitution Does Not Require That Capital Aggravating Factors Be Defined With Reference To Identified Factual Circumstances

The sole structural support for the respondent's argument as well as for the decision of the Court of Appeals is the premise that this Court's cases compel the conclusion that a valid state judicial construction limiting the reach of a statutory aggravating factor must be one which is constrained "by reference to circumstances capable of objective determination." (Respondent's Brief, p.6.) Creech extends this qualification beyond its former meaning with the contention that "circumstances capable of

objective determination" are those proved by "particular facts" or "specific acts." (Respondent's Brief, p.8; *Creech v. Arave*, 947 F.2d 873, 884 (9th Cir. 1991). Creech's theory, which is that of the Court of Appeals, is dependent upon references to "clear and objective standards" and "specific and detailed guidance" appearing in *Godfrey v. Georgia, supra*, and *Gregg v. Georgia*, 428 U.S. 153 (1976). These terms, however, are not self-defining and Creech cannot escape the context in which they have been set in this Court's cases. Instead of requiring the mechanical approach urged by respondent, the Court has required that states adopt procedures to ensure that the death penalty is not imposed arbitrarily or discriminatorily. *Barclay v. Florida*, 463 U.S. 939 (1983). Thus, when the court has used the terms "specific and detailed guidance" and "objective standards" it has been to describe the overall effect of a complete procedural system and *not* to require that each statutory aggravating circumstance be purged of all subjective influences. In *Proffitt v. Florida*, 428 U.S. 242, 253 (1976), for example, the court described a Florida statute, generally, by saying "under Florida's capital sentencing procedures, in sum, trial judges are given specific and detailed guidance to assist them in deciding whether to impose a death penalty or imprisonment for life." 428 U.S. at 253. The Florida statute under consideration contained subjective aggravating factors.[1] Likewise, the "clear and objective standards" language, which comes from *Gregg v. Georgia, supra*, was used to

[1] "Great risk of death to many persons," Fla. Stat. Ann. § 921.141(5) (Supp. 1976-1977); "was especially heinous, atrocious or cruel." *Id.*

characterize Georgia's entire sentencing system, which included subjective factors, and not to set down a requirement for factual definition of aggravating circumstances. To the contrary, the court acknowledged that the sentencer had *not been deprived* of discretion:

> While some jury discretion still exists, "the discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application." [Citation omitted.] 428 U.S. at 197-198.

Even in Godfrey, the court did not hold that "depravity of mind" as a criteria for applying an 'outrageously or wantonly violent" aggravating factor required a specification of facts that would prove depravity. The court held only that depravity of mind had not been defined and applied in such a way that it could be used to distinguish, in a principled way, cases in which the death penalty could be consistently imposed from the many cases for which the death penalty was not justified. 446 U.S. at 433. In *Maynard*, moreover, the Court pointed out that it was not requiring even the "especially heinous" factor to be limited by specific physical acts: "We . . . do not hold," the Court explained, "that some kind of torture or serious physical abuse is the only limiting construction of the heinous, atrocious, or cruel aggravating circumstance that would be constitutionally acceptable." 486 U.S. at 356.

Contrary to the Court of Appeals' supposition that discretionary judgment must be removed from the state trial court in favor of listing specific acts in order to prove "utter disregard for human life", this Court has stated that it did not intend to demand mathematical precision in the process of applying statutory aggravating factors.

Walton, supra.[2] The question, particularly in a judicial sentencing system is "whether [the state court's definitions of vague terms] provide *[s]ome* guidance to the sentencer." *Walton,* 111 L.Ed.2d at 529 (court's emphasis). The court has disavowed any intent to force states into a particular statutory mold, to require any particular kind of statutory structure or to require mathematical precision in the definition or application of statutory aggravating factors. Cf., *Pulley v. Harris,* 465 U.S. 37 (1983) (a state may choose whether or not to employ comparative proportionality review of death sentences); *Spaziano v. Florida,* 468 U.S. 447 (1988) (a state may choose to permit the determination of penalty by a judge rather than by a jury); *Cabana v. Bullock,* 474 U.S. 376, 386-387 (1985) (state may provide for making requisite findings of culpability at the appellate stage of the proceedings).

Apart from the respondent's error in contending that this Court's cases require factual limitation of the *Osborn* construction, his theory overlooks a traditional aspect of sentencing law. Although Creech insists otherwise, the judicial power to make a reasoned judgment about culpability was not taken away from the state courts by the

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[2] The decision of the Court of Appeals evidences substantial distrust of the ability and willingness of state judges to follow the Constitution. In effect, the state has been told that its limiting construction must be rewritten to define the facts that will prove a cold-blooded state of mind. Although one judge of the Court of Appeals has suggested that state courts are not to be trusted with constitutional adjudication, justifying more expansive federal review, *Coleman v. McCormick,* 874 F.2d 1280, 1295 (9th Cir. 1989), Reinhardt, J., concurring, Cert. denied, 493 U.S. 944 (1989), this is clearly not an accepted view in this Court. *Clemons v. Mississippi* 494 U.S. 738 (1990).

Eighth Amendment or by any other provision of the federal constitution.

There is traditional acceptance that evaluating the mental state with which the defendant acted is an exercise of sentencing judgment unencumbered by any requirement that a list of so-called objective facts be checked off. The essence of determining personal culpability is to question whether the defendant behaved callously, cold-bloodedly, with premeditation, or in accordance with any number of similar factors. This principle was emphasized in *Tison v. Arizona,* 481 U.S. 137 (1986):

> A critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime. Deeply engrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished. 481 U.S. at 156.

Tison was concerned with whether persons who had not actually killed, having been convicted on a felony murder theory, could be sentenced to death consistently with Eighth Amendment ideas of personal culpability. The governing criteria was defined by a term no less subjective than "utter disregard for human life":

> The reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result. 481 U.S. at 157-158.

The case was remanded to the Arizona Supreme Court to determine whether there was "reckless indifference" in the acts of the defendant.[3] On remand, no claim appears to have been made that "reckless indifference" would require further definition by the Arizona Supreme Court. *State v. Tison*, 774 P.2d 805 (Ariz. 1989)

The precedents reflect that the exercise of sentencing discretion is a process by which it is recognized that such language of moral culpability as "malice" or "heinousness" or "cold-bloodedness" reflects social intuition about degrees of culpability and that the validation of such intuition is a critical aspect of judgment:

> Rough judgments of the relative culpability of acts, by which I mean to include the contemporaneous state of mind of the actor, have long been integral to the criminal law. These judgments at their roughest level separate misdemeanors from felonies, and on a more refined level, various degrees of an offense. That these judgments reflect more widely held views in the society at large is confirmed by our intuitions (robbing a bank seems different from stealing a package of gum; negligent acts resulting in harm or death seem different from purposeful or knowledgeable acts with similar outcomes) . . . If it is not illogical to use deliberation or premeditation to distinguish first degree murder from second degree murder, and the fact

[3] Petitioner does not imagine that anyone would be long detained by the notion that a constitutional principle should turn on whether "reckless indifference" is more or less specific than "utter disregard."

> that most legislatures have done so indicates that the distinction captures a widespread intuition, why is it illogical to use "especially heinous, atrocious or cruel" to distinguish capital murder from first degree murder? Moreover, why would we not think that this distinction likely captures another distinction? The answer is obvious: it is not illogical at all to make the distinction, and it probably does capture a widely held intuition. Allen, Foreword – Evidence, Inference, Rules, and Judgment in Constitutional Adjudication: the Intriguing Case of Walton v. Arizona, 81 Journal of Criminal Law and Criminology, 727, 740-741 (1991).

The development of the concept of moral culpability as an aspect of sentencing discretion was reviewed in *McGautha v. California*, 402 U.S. 183 (1970). Justice Harlan, who wrote the court's opinion upholding the broad exercise of capital sentencing discretion, observed that:

> Those who have come to grips with the hard task of actually attempting to draft a means of channeling sentencing discretion have confirmed the lesson taught by history. . . . To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability. 402 U.S. at 204.

When it was decided to impose upon the states a requirement for narrowing the exercise of sentencing discretion, it was not because the court wished to remove from the sentencing process the sentencer's power to

make judgments about the defendant's moral culpability. Instead, the court sought to eliminate elements of discrimination and arbitrariness that were thought to have tainted the exercise of discretion. *Furman v. Georgia,* 408 U.S. 238 (1972). Thus, in *Gregg v. Georgia, supra,* the object was described as one of guiding or channeling the exercise of discretion by the sentencing authority. In *Proffitt v. Florida, supra,* the court concluded that the sentencer's focus on "the individual circumstances of each homicide and each defendant," 428 U.S. at 252, was important, and judicial sentencing was likely to lead to greater consistency "since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases." *Id.*

Lockett v. Ohio, 438 U.S. 586 (1977), carries forward the principle that a capital sentencing judgment must be guided by the inquiry into moral culpability and that this inquiry "requires consideration of the character and record of the individual offender and the circumstances of the offense as a constitutionally indispensable part of the process of inflicting the death penalty." *Lockett,* 438 U.S. at 604, *quoting Woodson v. North Carolina,* 428 U.S. 280, 289-298 (1976).

In *Walton, supra,* the court found that terms leaving it to the sentencing authority to make such judgments about culpability ("mental aguish" as a definition of "especially cruel"; "relishes the murder, evidencing debasement or perversion," or "shows an indifference to the suffering of the victim and evidences a sense of pleasure" to define "especially depraved") were constitutionally sufficient terms because they gave "meaningful

guidance to the sentencer." 111 L.Ed.2d at 529. These terms obviously do not describe particular acts at all. They are terms describing states of mind to be applied by a sentencing judge assessing moral culpability according to the intuitive understanding of society that relishing killing, debasement and perversity are identifiable mental states that are not present in most murders and thus set apart the worst offenses. Creech's effort to persuade this court that "evidence of debasement or perversion" and evidence of "a sense of pleasure in the killing" amount to descriptions of particular acts while evidence of "callousness," "cold-bloodedness" and "pitilessness" do not brings to mind oft-repeated cautions against reducing the law to semantic quibbling. "[A]lmost any word or phrase may be rendered ambiguous by dissection with a semantic scalpel," *Cole v. Richardson,* 397 U.S. 238, 240 (1970) but "condemned to the use of words, we can never expect mathematical certainty from our language." *Grayned v. City of Rockford,* 408 U.S. 104, 110 (1972).

This history leaves no room for respondent's contention that sentencing discretion has been so constricted by this Court's cases that the issue of personal culpability must be taken away from the sentencing judge, whose judgment reflects society's intuitions about callousness and cold-bloodedness, and replace it with an inflexible list of factual predicates.

III.

It Can Be Presumed That The Idaho Courts Knew And Applied The Requirements Of Federal Constitutional Law To Creech's Sentence; The State's Courts Are Capable Of Principled Application Of The "Utter Disregard" Factor

It is implicit in *Walton* that judicial sentencing, as contrasted with jury sentencing, brings to the sentencing process the additional advantage that the sentencer may be presumed to know the law and to recognize that limiting terms must be interpreted according to their narrowest meaning and not their broadest meaning. The Court, in *Walton*, distinguished the Arizona sentencing procedure from those in *Godfrey* and *Maynard* because Arizona employed judicial sentencing and its appellate courts had announced limiting constructions of the state's "heinousness" factor that gave some guidance to the sentencer. If it is appropriate to presume that sentencing courts and state reviewing courts know the limiting constructions previously settled, it is also appropriate to presume that they know and apply this Court's constitutional precedents. Cf. *Clemons v. Mississippi*, 484 U.S. 738, 749 (1989) (We conclude that State appellate courts can and do give each defendant an individualized and reliable sentencing determination based on the defendant's circumstances, his background, and the crime."); *Profitt v. Florida*, 428 U.S. 242 (1976) (Judges better equipped than juries to impose capital sentences in consistent fashion.)

In this light, the Court's approval in *Walton* of subjective terms of limitation, such as "depraved," defined as "relishes the murder, evidencing debasement or perversion," and its characterization of the use of these terms as

sufficiently objective guidance, must be taken as contrary to the Court of Appeals' position.

Respondent argues that the cases decided by the Idaho Supreme Court establish that the "utter disregard" factor is overbroad and standardless. He draws this conclusion from the circumstance that the factor has been applied in widely varying factual situations. But the inference is not sustainable. Inasmuch as the defendant's state of mind is the basis of the "utter disregard" factor, it makes no difference whether one acting callously, cold-bloodedly, or pitilessly planned the murder well in advance, or only a short time in advance; whether the victim was a child or an adult; whether there were multiple victims or a single victim; whether the defendant lay in wait or did not; or whether he acted without provocation or upon pretextual provocation. The requisite state of mind was present in all the cases respondent cites in support of his claim that the "utter disregard" factor has been applied inconsistently. The point of consistency is the fact that all these applications of the "utter disregard" factor were based on the killers personal culpability. See *State v. Fetterly*, 710 P.2d 1201 (Idaho 1985); *State v. Paz*, 798 P.2d 1 (Idaho 1990); *State v. Fain*, 774 P.2d 252 (Idaho 1989); *State v. Lankford*, 781 P.2d 197 (Idaho 1989); *State v. Pizzutto*, 810 P.2d 680 (Idaho 1991); *State v. Creech*, 670 P.2d 463 (Idaho 1983) *rehearing denied* (1983), *cert. denied*, 465 U.S. 1051 (1984).

The argument made on this point by respondent is another indication of the fault of the "fact-list" theory. It does not make a difference for purposes of assessing culpability whether one possessing the requisite state of mind has that state of mind in one or another factual situation.

IV.

Any Error In The Idaho Court's Application Of The Utter Disregard Factor Would Be Harmless

As Creech correctly observes, Resp. Br., pp. 29-30, the Idaho Supreme Court did not have reason to reweigh those aggravating circumstances remaining after omission of the "utter disregard" factor, or to consider whether the finding was harmless error. But this does not dispose of the question. This Court may consider the harmless nature of the error, should it decide that the Idaho court's limiting construction of the "utter disregard" factor was inadequate. Upon review of the record, the Court held in *Milton v. Wainwright*, 407 U.S. 371 (1972) that the erroneous admission of evidence against a habeas petitioner was harmless beyond reasonable doubt, for which reason the Court did not reach the merits of the constitutional claims. The limited nature of federal habeas review suggested special reason for harmless error analysis:

> The writ of habeas corpus has limited scope: the federal courts do not sit to retry state cases *de novo* but, rather to review for violation of federal constitutional standards. In that process we do not close our eyes to the reality of overwhelming evidence of guilt fairly established in the state court 14 years ago by use of evidence not challenged here; the use of additional evidence challenged in this proceeding and arguably open to challenge was, beyond reasonable doubt, harmless. 407 U.S. at 377.

The principle stated in *Milton* is particularly applicable here. The Idaho Supreme Court, in the process of determining whether Creech's death sentence was both

proportional and just, stated that it had never before been confronted with "any such remorseless, calculating, cold-blooded multiple murderer." *State v. Creech, supra*. The court held that none of its recent precedents suggested a basis for leniency in Creech's case. *Id.* "We find no instance in which a defendant found guilty of such previous crimes as those of Thomas Creech has been found deserving of a sentence less than death." *Id.* This language is clear evidence that the Idaho Supreme Court would have upheld Creech's sentence solely on the basis of the "propensity" factor. Were this case to be returned for resentencing, Creech would doubtless again be sentenced to death with no more than formality of revising the language of the sentencing findings.

This position is not diminished by Respondent's assertion that Idaho is a "weighing" state in which either the supreme court or the trial court might reach a different conclusion about the death penalty if the "utter disregard" factor were not available. Although Respondent seems to argue that reliance by the sentencer on an invalid aggravating factor always demands reversal of a death sentence in a "weighing" state, unless the state supreme court has conducted harmless error review, the argument is not correct. This Court may examine the record for harmless error, *Milton, supra*, and it is appropriate that it do so on federal collateral review where the state court has conducted independent review, for both proportionality and the justice of the sentence, and has announced, in effect, that it would uphold the death sentence solely on the basis Creech's propensity to commit murder.

Clemons v. Mississippi, supra, holds that in a "weighing" state a sentence is tainted by the sentencer's reliance on an invalid aggravating circumstance to the extent that a reviewing court must either reweigh or find harmless error. In *Sochor v. Florida,* 112 S.Ct. 2114 (1992) the Court vacated a death sentence where the Florida Supreme Court had invalidated one of multiple factors and had not made clear whether it had reweighed the remaining factors or conducted harmless error review. These cases express the Court's concern that individualized consideration of the merit of the death sentence may be diminished by uncertainty about the extent to which an invalid aggravating factor affected the sentencer's deliberations.

A different approach has been taken in states like Idaho where the finding of an aggravating factor is a threshhold event, following which the sentencer has the discretion to decline to impose the death penalty for any reason, and where independent review for arbitrariness provides assurances that excessive sentences will be set aside. *Zant v. Stephens,* 462 U.S. 862 (1982). Although there is statutory language calling upon the sentencer in Idaho to consider whether "mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstance found," Idaho Code § 19-2515(c), the sentencer has statutory notice that each aggravating factor is alone enough to trigger consideration of the death penalty. *Id.* In Idaho, as in Georgia, the sentencer is not instructed by law "to consider multiple aggravating circumstances any more significant than a single such circumstance, or to balance aggravating against mitigating circumstances pursuant to any special standard." *Zant v. Stephens, supra* 462 U.S. at 874; *State v. Sivak,* 674 P.2d 396 (Idaho 1983). By contrast, in weighing states such as Mississippi and Florida, the sentencer is instructed to consider generally whether the circumstances from a statutory list are "sufficient" to justify the death penalty. The statutory language leaves room for the sentencer to conclude that some aggravating factors have greater weight than others, thus creating the possibility that the sentencer may impose the death penalty in some cases only because of a cumulation of factors which could be affected by the removal of one or more of them from consideration. See Miss. Code Ann. § 99-19-101(2)(b) (Supp. 1992); Fla. Stat. § 921.142(3).

The Idaho Supreme Court's unequivocal statement that Creech was, in its view, the worst of capital offenders calls for application of the principle that a reviewing court in a non-weighing state may uphold a death sentence on independent review without complying with the plain statement rule of *Sochor,* even if the Court were to decide against the "utter disregard" factor. *Zant v. Stephens, supra.*

V.

The Application Of The "Utter Disregard" Factor To The Evidence Is Not Properly An Issue In This Court

Creech's contention that the evidence was insufficient to support the "utter disregard" factor raises an issue of factual interpretation which is outside the scope of federal review because, as the Court held in *Lewis v. Jeffers,* 111 L.Ed.2d 606 (1990), "where the issue is solely whether a state court has properly found the existence of constitutionally narrowed aggravating circumstance, we

have never required federal courts 'to peer majestically over the [state] court's shoulder so that [they] might second guess its interpretation of facts that quite reasonably – perhaps even plainly – fit within the statutory language.' " 111 L.Ed.2d at 623.

The interpretative factual description advanced by Creech is that he was the victim of an "unprovoked" first attack by Jensen. But the Idaho Supreme Court did not, as Creech contends, find that the murder was other than callous, cold-blooded, and calculated. Although the supreme court remarked that the *district judge* had not found that the murder "had been performed on contract or by plan," 670 P.2d at 465, the court found (1) that the record "clearly supports the trial court's findings of aggravating and mitigating circumstances and (2) upon its own independent review of the facts it was possible to say that Creech was more "remorseless, calculating and cold-blooded," than any other murderer whose case had been considered by the court in the past fifty years. 670 P.2d at 470; 476.

The record of the preliminary hearing, which, given Creech's guilty plea, was the only place other than the sentencing hearing where evidence of the crime was formally taken, showed that Creech, after giving inconsistent versions of the killing, admitted that (1) he disliked Jensen, (2) he had been advised by another inmate to "do Jensen in," (3) he had caused Jensen to believe he was in danger from Creech, (4) he had given a sock full of batteries and a toothbrush with a razor blade attached to an inmate named Balla, (5) Balla, in turn gave the weapons to Jensen (who was not capable of using them effectively) and (6) when Jensen came out of his cell,

Creech, predictably, took the weapons away from Jensen and beat him to death. See Exhibit W, Supplemental Excerpt of Record, pp. 77-83. This background, if nothing else, at least demonstrates that Creech's invitation to reinterpret the facts before the Idaho Supreme Court cannot be taken seriously. If the "utter disregard" factor is unconstitutionally vague, the evidence supporting it is of no moment. Otherwise, the proper interpretation of the evidence is a question of state law.

CONCLUSION

The judgment of the Court of Appeals should be reversed to the extent it orders that Creech's death sentence be vacated.

Respectfully submitted,

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NO. 91-1160

IN THE
Supreme Court of the United States

October Term, 1992

A.J. ARAVE, WARDEN,

Petitioner,

v.

THOMAS E. CREECH,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION OF APPLICANT THOMAS GIBSON FOR LEAVE TO FILE AMICUS CURIAE BRIEF SUPPORTING RESPONDENT CREECH

and

CORRECTED AMICUS CURIAE BRIEF OF THOMAS GIBSON

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Applicant Thomas Gibson, through his counsel of record, respectfully requests leave to file the accompanying brief in this case as amicus curiae. Applicant has not obtained formal written consent to file a brief as amicus curiae from counsel for petitioner or respondent.

Applicant Gibson is now a prisoner incarcerated in the Idaho State Correctional Institution under sentence of death. Applicant Gibson's sentence for aggravated murder was imposed by an Idaho state court based solely upon the aggravating circumstance set forth in Idaho Code section 19-2515(g)(6):

> By the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life.

This provision was declared unconstitutionally vague by the United States Court of Appeals for the Ninth Circuit in Creech v. Arave, 947 F.2d 873 (9th Cir. 1991). This Court has issued a writ of certiorari to the

Ninth Circuit and will decide the constitutionality of Idaho Code section 19-2515(g)(6) in this case.

Applicant Gibson has filed a petition for habeas corpus in the United States District Court for the District of Idaho. His petition, inter alia, challenges the application of Idaho Code section 19-2515(g)(6) on the ground that it is unconstitutionally vague. Applicant's habeas corpus proceeding has been stayed by the District Court, pending final ruling case on the constitutionality of Idaho Code section 19-2515(g)(6).

The Respondent in this case seeks affirmance of the Ninth Circuit's ruling that the aggravating circumstance set forth in Idaho Code section 19-2515(g)(6) is unconstitutionally vague. Applicant Gibson supports Respondent's arguments.

Because this court will ultimately decide the constitutionality of the portion of the Idaho statute under which he was

sentenced, applicant Gibson will not have an opportunity to present his arguments challenging the constitutionality of the statute unless he is granted leave to file a brief of amicus curiae. If applicant is not allowed the opportunity to address the constitutionality of the statute in this case, the constitutionality of his sentence under the Idaho statute will thus be decided without applicant having an opportunity to be heard by this Court.

DATED this 4th day of September, 1992.

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INTRODUCTION AND INTEREST OF AMICUS CURIAE

Thomas Gibson submits this brief as amicus curiae. Gibson supports affirmance of the Ninth Circuit's decision in Creech v. Arave, 947 F.2d 873 (9th Cir. 1991), holding that Idaho Code section 19-2515(g)(6) is unconstitutionally vague. Gibson supports the position of respondent Creech in this appeal.

Gibson is an inmate in the Idaho State Correctional Institution. On November 5, 1981, he was convicted of first degree murder. The trial judge sentenced him to death based on Idaho Code section 19-2515(f)(6) (now Idaho Code section 19-2515(g)(6)). Gibson was sentenced to death based on the same aggravating circumstance that is at issue in this appeal. Gibson has exhausted state law remedies and has a Petition for Writ of Habeas Corpus pending before the United States District Court for the District

of Idaho. The reasons in support of Gibson's application for leave to file a brief as amicus curiae are stated in the attached motion.

SUMMARY OF ARGUMENT

The brief submitted by respondent Creech fully and persuasively analyzes the unconstitutionality of the Idaho death penalty scheme as it was applied in his case. A review of the application of the same statutory scheme to the facts in Gibson's case highlights the unconstitutional unfettered discretion available to the trial court in sentencing under Idaho Code section 19-2515(g)(6). The Idaho statute violates the Eighth Amendment of the United States Constitution.

ARGUMENT

Since Furman v. Georgia, 408 U.S. 238 (1972), the Court has required that in capital cases the discretion of the sentencing judge "must be suitably directed and limited

so as to minimize the risk of wholly arbitrary and capricious action." (Opinion of Stewart, Powell and Stevens.)

The Court has also held that "'channeling and limiting . . . the sentencer's discretion in imposing the death penalty' is a 'fundamental constitutional requirement.'" Walton v. Arizona, _____ U.S._____, 110 S. Ct. 3047, 3060-61 (Scalia, J. concurring) (quoting Maynard v. Cartright, 486 U.S. 356, 362 (1988)). The Court has required that the "states furnish the sentencer with 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" Id. (quoting Godfrey v. Georgia, 446 U.S. 420, 428 (1980).

The Ninth Circuit has correctly determined that the aggravating circumstance stated in Idaho Code section 19-2515(g)(6) is unconstitutionally vague. Creech v. Arave, 947 F.2d 873, 882-885 (9th Cir. 1991). In

assessing the merit of the Ninth Circuit's conclusion, the Court will be guided by its previous statements in Walton, 110 S. Ct. at 3057. In that case, the Court held that it must first determine whether the applicable aggravating circumstance is too vague and then determine whether the Idaho State Court has further defined the vague terms sufficient to provide "some guidance to the sentencer." Id. at 3057.

This Court has previously explained that such an aggravating circumstance must "channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance and that make rationally reviewable the process for imposing a sentence of death." Godfrey v. Georgia, 446 U.S. 420, 428 (1980).

The State of Idaho has failed to provide sufficient guidance to interpret the aggravating circumstance stated in Idaho Code section 19-2515(g)(6). The pertinent provi-

sion states: "By the murder or the circumstances surrounding its commission, the defendant exhibited utter disregard for human life." The Idaho Supreme Court has said that, "[t]he phrase is meant to be reflective of acts or circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, i.e., the cold blooded pitiless slayer." State v. Osborn, 102 Idaho 405, 631 P.2d 187, 201 (1981). The Idaho Supreme Court further noted that the aggravating circumstance stated in Idaho Code section 19-2515(g)(6) must be viewed in reference to acts other than those described in other aggravating circumstances. Id. at 200-01.

The facts of Gibson's case make it plain that the aggravating circumstance stated in Idaho Code section 19-2515(g)(6) and the Idaho Supreme Court's interpretation of that language does not furnish the sentencer with clear and objective standards that

provide specific and detailed guidance to insure that the death penalty is not meted out arbitrarily and capriciously.

The Idaho Supreme Court's opinion in State v. Gibson, 106 Idaho 64, 675 P.2d 33 (1983), states the pertinent facts of Thomas Gibson's case. As the court described it, on June 21, 1980, Gibson observed Donald Paradis beat a man named Currier to death in a house in Spokane, Washington. He then observed a witness, Kimberly Palmer, running out of the house and he attempted to stop her. Thereafter, another man present, Larry Evans, strangled her and Gibson believed that she was dead.

Gibson, Paradis and Evans then took the bodies of Palmer and Currier by van from Spokane to Post Falls, Idaho. Gibson testified that he stayed in the van while Paradis and Evans moved the bodies of Palmer and Currier and left them abandoned on a hillside. There was no contrary testimony con-

cerning the circumstances of Palmer's death from any witness at the trial. Paradis did not testify and Evans could not be located. The State offered medical evidence at trial to support its theory that demonstrated that Ms. Palmer died by strangulation in Idaho.

After Gibson was convicted of murder, the trial judge sentenced him to death based on the aggravating circumstance stated in Idaho Code section 19-2515(g)(6) (formerly section 19-2515(f)(6). In his findings supporting the imposition of death, the trial judge found beyond a reasonable doubt:

> (n) That either the defendant, Donald Paradis, or Larry Evans actually killed Kimberly Ann Palmer.
>
> (o) That the defendant either directly committed the act constituting the premeditated murder of Kimberly Ann Palmer or aided and abetted in its commission.

675 P.2d at 45. As Justice Bistline pointed out in dissent, the trial court found that Gibson "may or may not have been the person out of the three possibles who attended to

the strangling of the victim, or was but an aider and abettor." Id. (Emphasis in original.)

The trial judge concluded that Thomas Gibson exhibited utter disregard for human life within the meaning of I.C. 19-2515(g)(6), even though the trial judge did not know who killed Ms. Palmer, did not know where she was killed, and did not know the circumstances of her killing. The trial judge only knew that Thomas Gibson was there.

Larry Evans, who the trial judge had found to present at the scene of the crime, was later apprehended and tried for the killing of Ms. Palmer in Idaho. He was acquitted.

CONCLUSION

Thomas Gibson's case further demonstrates to this Court that the aggravating factor set forth in Idaho Code section 19-2515(g)(6) is unconstitutionally vague. The Court must affirm the decision of the

Ninth Circuit in Creech v. Arave, holding that Idaho Code section 19-2515(g)(6) is unconstitutionally vague.

DATED this 4th day of September, 1992.

SHORT CRESSMAN & BURGESS

By: _____
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FOR ARGUMENT

No. 91-1160

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

A. J. ARAVE,

Petitioner,

v.

THOMAS EUGENE CREECH,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Does the Idaho Supreme Court's construction of Idaho's "utter disregard for human life" aggravating factor adequately channel the sentencer's discretion in imposing the death penalty where it does not require proof of any particular fact or circumstance, but instead requires the sentencer to make a decision based on wholly subjective criteria?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1160

A. J. ARAVE,
Petitioner,

v.

THOMAS EUGENE CREECH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

On May 13, 1981, Thomas Creech and David Jensen were inmates in the maximum security unit at the Idaho Correctional Facility. At 2:00 that afternoon, Jensen attacked Mr. Creech by swinging a sock full of batteries at him. (RT 1984 at 15-20, 26-27.)[1] Mr. Creech defended himself, punching Jensen and taking the batteries away from him. Fifteen minutes later, Jensen once again at-

[1] "RT 1984" refers to the Reporter's Transcript covering the February 1984 guilty plea withdrawal hearing. "RT 1981" refers to the Reporter's Transcript covering the August 1981 change of plea hearing. "RT 1982" refers to the Reporter's Transcript covering the January 1982 sentencing hearing. "ER" refers to the Excerpt of Record filed in this case.

tacked Mr. Creech, this time slashing him with a razor blade attached to a toothbrush. He slashed Mr. Creech in the stomach, the arms and the face. Mr. Creech swung the sock of batteries at Jensen, hitting him in the head until he collapsed and died. (RT 1984 at 26-33.) Before being taken to the hospital in a wheelchair, and immediately after the fight, Mr. Creech referred medical aid to Jensen. (RT 1984 at 34; ER 156-157.)

Mr. Creech was charged with first degree murder on June 8, 1981, and pled not guilty. (JA 16-17, 19.) On August 26, 1981, Mr. Creech wrote a letter from his prison cell to Judge Robert Newhouse, advising the judge that he wished to "accept the responsibility of taking another life" by changing his plea to guilty. (RT 1981 at 35; ER 121.) Judge Newhouse received the letter and set a change of plea hearing for August 28, 1981. (RT 1981 at 35; JA 22-23.)

At the time of the hearing, and as the federal district court later found, the state had not yet provided discovery and defense counsel had not yet investigated the case or "discovered Creech may have been guilty only of manslaughter in the killing." (JA 150.) Similarly, the federal district court found that defense "counsel had not discussed with Creech the specific elements of the offense with which he was charged or possible defenses to those charges." (JA 149-150.) Because defense counsel had not yet investigated the case, and was not in a position to advise Mr. Creech, he requested a five-day continuance. (RT 1981 at 40; JA 23.) The court denied this request and, over defense counsel's objection, accepted Mr. Creech's uncounseled guilty plea to the capital charge. (JA 22-25; RT 1981 at 39-40.)[2]

[2] The propriety of accepting an uncounseled guilty plea to a capital case is the subject of Mr. Creech's Cross-Petition for Writ of Certiorari, No. 91-7348. Although this Court ordered the Idaho Solicitor General to file a response, there has not yet been a ruling on the cross-petition.

After a January 11, 1982 sentencing hearing the state trial court issued findings of fact. The trial court explicitly found that Jensen had attacked Mr. Creech without provocation and that Mr. Creech was initially justified in defending himself:

> [T]he defendant did not instigate the fight with the victim, but the victim, without provocation, attacked him. [Defendant] was initially justified in protecting himself. (JA 32.)

The state trial court also found, however, that Mr. Creech's actions went "well beyond self-defense" and evidenced an "excessive violent rage." (JA 33.)

In sentencing Mr. Creech to death, the trial court relied on Idaho's "utter disregard" aggravating factor, finding that "[b]y the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life." (JA 34). As required by Idaho law, the trial court then weighed the aggravating factors against the mitigating factors. (JA 35.) Finding that "the mitigating circumstances do not outweigh the gravity of the aggravating circumstances" the trial court imposed a sentence of death. (JA 35.)

On February 25, 1983, the Idaho Supreme Court vacated the death sentence and ordered a new sentencing hearing at which the trial court would select a "just and approprate" sentence. (JA 38-39.) At the second sentencing hearing, however, the trial court refused to allow Mr. Creech to present any evidence in rebuttal or mitigation. (JA 49-75.) Instead, the court simply re-read its earlier findings, including the uttter disregard factor, into the record. (JA 50-55.)

On appeal, the Idaho Supreme Court affirmed the trial court's utter disregard finding without elaboration, holding that "the evidence clearly supports the trial court's findings of aggravating and mitigating circumstances." *State v. Creech*, 670 F.2d 463, 470 (Idaho 1983). That

court then performed proportionality analysis, comparing this case to other capital cases, and concluded that the death sentence was proportionate. *State v. Creech*, 670 P.2d at 476.

After being denied relief in the state courts, Mr. Creech filed a habeas corpus petition in federal district court. The federal district court denied the petition. Mr. Creech appealed to the Court of Appeals.

On October 16, 1991, a panel of the Ninth Circuit consisting of Judges Hall, Wiggins and Beezer reversed and ordered that Mr. Creech be resentenced, holding that the Idaho courts had violated the Eighth Amendment in completely precluding Mr. Creech from presenting any mitigating evidence at his sentencing hearing. *Creech v. Arave*, 947 F.2d 873, 881-882 (9th Cir. 1991). In addition, the Court of Appeals held that Idaho's "utter disregard" aggravating factor was unconstitutionally vague. *Creech v. Arave*, 947 F.2d 873, 882-885 (9th Cir. 1991). On January 14, 1992, petitioner sought a Writ of Certiorari in this Court, which was granted on June 15, 1992 and modified on August 12, 1992.[3]

SUMMARY OF ARGUMENT

Idaho Code Section 19-2515(g)(6) provides that anyone convicted of murder is eligible for the death penalty if he exhibits "utter disregard for human life." In *State v. Osborn*, 631 P.2d 187 (Idaho 1981), the Idaho Supreme Court recognized that this phrase was unconstitutionally vague, but attempted to give it a proper limiting construction by defining it as "reflective of acts or circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, i.e., the cold-

[3] In light of the Court's August 12 order, respondent understands that the issue presented in this case is the constitutionality of Idaho's "utter disregard" aggravating factor. Accordingly, respondent will not address those portions of petitioner's brief which do not pertain to this issue.

blooded, pitiless slayer." 631 P.2d at 200-201. The state trial court sentenced Mr. Creech to die, in part, by relying on this factor. (JA 53.)

The Court of Appeals properly held that the *Osborn* construction was itself unconstitutionally vague. *Creech v. Arave*, 947 F.2d at 882-885. As the Court of Appeals noted, for an aggravating factor to fulfill its constitutional purpose of guiding the sentencer's discretion and avoiding the arbitrary imposition of the death penalty, it must require proof of some fact or circumstances which is capable of objective determination. This result not only follows inexorably from principles of law this Court has long established, but it is consistent with the uniform weight of authority throughout the country as well.

The limiting construction placed upon the utter disregard factor by *Osborn* is purely subjective and does not provide the sentencer with the specific and detailed guidance essential to a capital punishment scheme. The Idaho Supreme Court's own conclusion that the evidence supported this aggravating factor does not cure the sentencer's reliance on this aggravating factor. In applying the utter disregard aggravating factor, the Idaho Supreme Court has refused to hold that any particular fact must be present to establish the factor, but instead has simply focused on all the circumstances surrounding the crime. *It has never reversed a single utter disregard finding.* Thus, neither the *Osborn* formulation nor the Idaho Supreme Court's applications of that factor provide a principled way to distinguish those cases in which the utter disregard factor is found from those in which it is not.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT IDAHO'S "UTTER DISREGARD" AGGRAVATING FACTOR WAS UNCONSTITUTIONAL.

The Idaho courts have sentenced Mr. Creech to death, in part, by relying on Idaho Code Section 19-2515(g)(6) and finding that he killed with an "utter disregard" for life. Petitioner does not dispute that this language is facially unconstitutional. Petitioner argues that the Court of Appeals erred in refusing to accede to the "subjective but workable statutory definition" fashioned by the Idaho Supreme Court. Pet.Br. at 17. Petitioner's argument must be rejected.

A. The *Osborn* Construction Is Unconstitutional Because It Contains No Reference To Any Circumstance Capable Of Objective Determination.

1. *The Eighth Amendment requires that an aggravating factor guide the sentencer's discretion by reference to circumstances capable of objective determination.*

In *Godfrey v. Georgia*, 446 U.S. 420 (1980) this Court made clear that under the Eighth Amendment "[a] capital sentencing scheme must . . . provide a 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not.'" 446 U.S. at 428, *quoting Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring). *Accord Lewis v. Jeffers*, 497 U.S. 764, 110 S.Ct. 3092, 3099 (1990). The Court has "insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988). *See Smith v. Goguen*, 415 U.S. 566, 573 (1973). This process also serves to "'make rationally reviewable the process for imposing a sentence of death.'"

Lewis v. Jeffers, 110 S.Ct. at 3099; *Godfrey v. Georgia*, 446 U.S. at 428.

A state may rely on the presence of certain aggravating factors to accomplish this "constitutionally necessary narrowing function." *Pulley v. Harris*, 465 U.S. 37, 50 (1984). In order to achieve this purpose, however, such factors must "genuinely narrow the class of persons eligible for the death penalty and . . . reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877 (1983).

Given the "constitutionally necessary narrowing function" of aggravating factors, and in order to ensure that they fulfill the "fundamental constitutional requirement [of] sufficiently minimizing the risk of wholly arbitrary and capricious action" this Court has repeatedly held that a state's aggravating factors must furnish the sentencer with "clear and objective standards" that provide "specific and detailed guidance." *Lewis v. Jeffers*, 110 S.Ct. at 3099; *Godfrey v. Georgia*, 446 U.S. at 428; *Gregg v. Georgia*, 428 U.S. 153, 198 (1976); *Proffitt v. Florida*, 428 U.S. 242, 253 (1976).[4]

Thus, where a state court has articulated a limiting construction of a facially unconstitutional aggravating factor which requires proof of some fact or circumstance capable of objective determination, the Court has held the limiting construction constitutional. *See Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 3057-3058 (1990)

[4] The requirement of objective guidance has deep roots in this Court's due process precedents as well. When a state statute contains no terms "susceptible of objective measurement," containing no reference to "a specific or definite act," the Court has declared the statute unconstitutionally vague under the due process clause. *See, e.g., Cramp v. Board of Public Instruction*, 368 U.S. 278, 286 (1961); *Champlin Refining Co. v. Corporation Commission of Oklahoma*, 286 U.S. 210, 243 (1932), *overruled on other grounds, Phillips Petroleum v. State of Oklahoma*, 340 U.S. 190 (1950); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921).

(upholding limiting construction of facially invalid "especially heinous, cruel or depraved" aggravating factor where it had been meaningfully narrowed by reference to the infliction of mental anguish or physical abuse, relishing the murder or showing indifference to the victim's suffering); *Godfrey v. Georgia*, 446 U.S. at 430-431 (upholding limiting construction of aggravating factor when narrowed by reference to torture, aggravated battery or serious physical abuse); *Proffitt v. Florida*, 428 U.S. at 255-256 (upholding limiting construction of "heinous, atrocious or cruel" aggravating factor when it had been narrowed by reference to torture).[5]

On the other hand, where an aggravating factor (or its limiting construction) does not require proof of some fact capable of objective determination, this Court has not hesitated to hold the aggravating factor unconstitutional. *See Shell v. Mississippi*, —— U.S. ——, 111 S.Ct. 313 (1990) (invalidating Mississippi's "especially heinous and atrocious" aggravating factor where the state's limiting construction did not require proof of any fact capable of objective determination); *Maynard v. Cartwright*, 486 U.S. at 364-365 (rejecting Oklahoma's "especially heinous, atrocious or cruel" aggravating factor where state courts did not require proof of any particular fact); *Godfrey v. Georgia*, 446 U.S. at 428-433 (rejecting Georgia Supreme Court's finding of "outrageously or wantonly vile" aggravating factor where state court did not require proof of any particular fact).[6]

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[5] The federal circuits are in accord. *See, e.g., Boggs v. Bair*, 892 F.2d 1193, 1197 (4th Cir. 1989) (upholding limiting construction of aggravating factor narrowed by reference to aggravated battery beyond that inherent in the murder itself), *cert. denied*, 495 U.S. 940 (1990); *Proffitt v. Wainwright*, 685 F.2d 1227, 1263 (11th Cir. 1982) (upholding limiting construction of aggravating factor narrowed by reference to torture).

[6] *Accord, Moore v. Clarke*, 904 F.2d 1226, 1229-1233 (8th Cir. 1990), *opinion denying petition for rehearing*, 951 F.2d 895, 897-898 (invalidating Nebraska's entirely subjective limiting definition

Indeed, this Court has made clear that the requirement of objective criteria applies even where the entity finding the aggravating factor is a state reviewing court. Thus, where an aggravating factor (or its limiting construction) does not furnish the sentencer with the type of objective guidance *Godfrey* requires, a state reviewing court can "cure" the error. To do so, however, the reviewing court must have articulated some circumstance capable of objective determination which is necessary to establish the aggravating factor. *Maynard v. Cartwright*, 486 U.S. at 360-364; *Godfrey v. Georgia*, 446 U.S. at 428-433. *See also Clemons v. Mississippi*, 494 U.S. 738, 110 S.Ct. 1441, 1454 (1990) (Blackmun, J., concurring). Where the reviewing court has never held that any particular fact was necessary to establish the aggravating factor, but has simply looked at the circumstances surrounding each crime in determining if the aggravating factor was properly found, its finding of sufficient evidence to support the aggravating factor will not cure the error because it does not provide a principled way to distinguish those cases in which the death penalty is imposed from those in which it is not. *Maynard v. Cartwright*, 486 U.S. at 364; *Godfrey v. Georgia*, 446 U.S. at 433. *See also Clemons v. Mississippi*, 110 S.Ct. at 1453-1454 (1990) (Blackmun, J., concurring).

In *Maynard v. Cartwright*, 486 U.S. 356, for example, the Court held unconstitutional a limiting construction of an Oklahoma aggravating factor which did not require proof of any particular fact or circumstance. There,

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of "especially heinous, atrocious or cruel" because it "does not cure the lack of objective standards" in the aggravating factor itself), *cert. denied*, —— U.S. —— (1992); *Newlon v. Armontrout*, 885 F.2d 1328, 1334 (8th Cir. 1989) (aggravating factors must be "capable of objective determination"), *cert. denied*, —— U.S. ——, 110 S.Ct. 3301 (1990); *Cartwright v. Maynard*, 822 F.2d 1477, 1491 (10th Cir. 1987) (invalidating Oklahoma's "heinous, atrocious and cruel" aggravating factor because it was not "a factor . . . capable of objective determination"), *aff'd*, 486 U.S. 356 (1988).

defendant was sentenced to death, in part, based on the sentencer's finding that the killing was "heinous, atrocious, or cruel." In prior cases, the Oklahoma courts had looked at a number of different circumstances as sufficient to uphold a finding of this aggravating circumstance, including "the attitude of the killer, the manner of the killing, and the suffering of the victim . . . ." 486 U.S. at 360. Significantly, however, as this Court noted, the Oklahoma courts had " 'refused to hold that any one of those factors *must* be present for a murder to satisfy this aggravating circumstance.' Rather, the Oklahoma court simply had reviewed all of the circumstances of the murder and decided whether the facts made out the aggravating circumstance." 486 U.S. at 360 (citations omitted).

The Court first held that the language of the aggravating factor itself did not provide the type of guidance required by the Eighth Amendment.[7] The state then argued that although the Oklahoma reviewing courts had never required that any particular fact or circumstance must be present to establish the aggravating factor, the reviewing court's finding of sufficient evidence to support the aggravating factor cured any error. The state argued that it was permissible to simply review all the circumstances around the crime and determine if the crime was "heinous, atrocious or cruel." 468 U.S. at 364. This Court explicitly repudiated this approach, "plainly reject[ing] the submission that a particular set of facts surrounding a murder, however shocking they might be, were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty." *Maynard v. Cartwright*, 486 U.S. at 363. *Accord Godfrey v. Georgia*, 446 U.S. at 429-433. The Court went even further and expressed approval of a limiting construction which would require "some kind of torture or physical abuse." 486 U.S. at 364-365.

[7] The jury had been given a limiting instruction:

> The term 'heinous' means extremely wicked or shockingly evil; 'atrocious' means outrageously wicked and vile; 'cruel' means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others.

Cartwright v. Maynard, 822 F.2d at 1488, n.6.

Petitioner suggests that requiring aggravating factors to provide objective guidance would impinge on the discretion of states to administer their capital punishment statutes. Pet. Br. at 17. Petitioner is wrong. In fact, state courts throughout the country have long embraced this precise requirement. For example, in *Arnold v. State*, 236 Ga. 534, 224 S.E.2d 386 (1976) the Georgia Supreme Court held that an aggravating circumstance which required "a substantial history of serious assaultive criminal convictions" was unconstitutional precisely because it did not contain even a minimal reference to some objective criteria:

> Whenever a statute leaves too much room for personal whim and subjective decision-making without a readily ascertainable standard or minimal objective guidelines for its application, it cannot withstand constitutional scrutiny.

224 S.E.2d at 381.

The Supreme Courts of Louisiana, Delaware, Connecticut, Colorado and Arkansas have also held that to withstand constitutional scrutiny, an aggravating factor must provide "minimal, objective guidelines sufficiently distinct to administer the law impartially . . . . [A]n aggravating circumstance which fails to provide such clear and objective standards cannot withstand constitutional scrutiny." *State v. David*, 468 So.2d 1126, 1128-1129 (La. 1985), *cert. denied*, 476 U.S. 1130 (1986). *Accord State v. Sonnier*, 402 So.2d 650, 647-658 (La. 1981), *cert. denied*, 463 U.S. 1229 (1983); *State v. English*, 367 So.2d 815, 823 (La. 1979); *Re Petition of State for Writ of Mandamus*, 433 A.2d 325, 326 (Del. 1981); *State v. White*, 395 A.2d 1082, 1090-1091 (Del.

1978); *State v. Breton*, 562 A.2d 1060, 1066 (Conn. 1989) (although aggravating factor requiring an "especially cruel" murder was invalid because it imposed a "subjective standard," limiting construction requiring torture rendered it constitutional because such was "an objective judicial gloss"); *People v. Davis*, 794 P.2d 159, 186 (Colo. 1990) (in order to serve their constitutionally required purpose, aggravating factors must be "capable of objective determination . . . ."), *cert. denied*, —— U.S. ——, 111 S.Ct. 662 (1991); *Wilson v. State*, 295 Ark. 682, 751 S.W.2d 734, 738 (1988), *modified*, 295 Ark. 692, 752 S.W.2d 761 (1988).

Similarly, for many years state courts throughout the country have been narrowing facially invalid aggravating factors by requiring proof of some fact or circumstance capable of objective determination. *See, e.g., State v. Wood*, 648 P.2d 71, 85-86 (Utah 1982) (narrowing "ruthlessness and brutality" aggravating factor to require torture or aggravated battery), *cert. denied*, 459 U.S. 988 (1982); *State v. Rook*, 304 N.C. 201, 283 S.E.2d 732 (1979) (in order to avoid claim of subjectivity, court narrows "heinous, atrocious and cruel" aggravating factor to require torture), *cert. denied*, 455 U.S. 1098 (1982); *State v. Brogdon*, 457 So.2d 616 (La. 1984) (same), *cert. denied*, 471 U.S. 1111 (1985); *Hance v. State*, 254 Ga. 856, 268 S.E.2d 339 (1980), *cert. denied*, 449 U.S. 1067 (1980).

Thus, not only have this Court's own precedents recognized that some reference to a circumstance capable of objective determination is the linchpin of the Eighth Amendment, but the federal courts of appeals and the state courts have long reached the same conclusion. Without such a reference, an aggravating factor cannot fulfill its constitutionally required goals.

2. *The* Osborn *construction of the "utter disregard" aggravating factor contains no reference to any circumstance capable of objective determination and is unconstitutional.*

In this case, the Idaho Supreme Court defined the "utter disregard" aggravating factor as "reflective of acts or circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer." *State v. Osborn*, 631 P.2. at 200-201. The first part of *Osborn's* definition—requiring "the highest, the utmost, callous disregard for human life"—does not solve the fundamental vagueness problem in this case. Replacement of the word "utter" with the synonyms "highest" and "utmost" simply restates the language of the statute. As such, it provides no more guidance than the language of the statute itself. *See Maynard v. Cartwright*, 486 U.S. at 364 (addition of the word "especially" to the term "heinous" does not cure vagueness problem); *Godfrey v. Georgia*, 446 U.S. at 428-429 (addition of the phrase "outrageously or wantonly" to the term "vile" does not cure vagueness problem). "Vague terms do not suddenly become clear when they are defined by reference to other vague terms." *Cartwright v. Maynard*, 822 F.2d at 1489.

Nor does the remainder of the *Osborn* reformulation—the terms "callous," "cold-blooded" or "pitiless"—add any element of objectivity to *Osborn*'s formulation. Thus, and with admirable candor, petitioner concedes that the *Osborn* formulation does not require proof of any particular facts before an utter disregard finding may be made but, instead, relies on the sentencer to look at the circumstances of each case and decide whether utter disregard has been established:

> [The *Osborn* construction] does not make findings of the aggravating factor[] depend on the presence of particular facts. Instead, Idaho has chosen to rely on the ability of the sentencing judge to make principled

> distinctions between capital and non-capital cases with guidance that is somewhat subjective . . . .

Pet.Br. at 9. Petitioner argues that the *Osborn* formulation presents a "subjective but workable statutory definition . . . ." Pet.Br. at 17.

Respondent's concession that the *Osborn* formulation "does not make findings of the aggravating factor[] depend on the presence of particular facts" brings this case squarely within *Cartwright*, *Godfrey* and *Clemons*. As in each of those cases, Idaho does not require proof of any particular fact in order to establish the utter disregard aggravating factor. Instead, pursuant to the precise language in *Osborn*, the sentencer may rely on the entirety of the "acts and circumstances surrounding the crime" in order to narrow the scope of the utter disregard aggravating factor. As the Tenth Circuit noted in this exact context:

> We agree that all of the circumstances surrounding a murder must be examined to determine whether the murder was 'especially heinous, atrocious, or cruel,' but there must be some objective standard that specifies which circumstances support such a determination. Consideration of all the circumstances is permissible; reliance upon all of the circumstances is not.

Cartwright v. Maynard, 822 F.2d at 1491, *aff'd*, 486 U.S. 356. Idaho's approach to its utter disregard aggravating factor is precisely what *Cartwright*, *Godfrey* and *Clemons* forbid.

In support of its position that it is constitutional to define an aggravating factor without requiring proof of any particular fact, but solely by reference to subjective criteria, petitioner relies on *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047. There, the Court addressed the constitutionality of Arizona's "especially heinous, cruel or depraved" aggravating circumstance. Arizona had defined "cruel" to require the infliction of mental anguish

or physical abuse before the victim's death, including a victim's uncertainty as to his ultimate fate. 110 S.Ct. at 3057-3058. The Court held that this limiting definition was "virtually identical" to the limiting construction it had approved in *Maynard v. Cartwright*, 486 U.S. 356 at 364-365, requiring "torture or physical abuse." *Walton v. Arizona*, 110 S.Ct. at 3058. In upholding the Arizona Supreme Court's limiting definitions of the "depraved" component of this aggravating factor, the Court repeatedly noted those aspects of the state's definition which required proof of criteria which could be objectively detemined:

> Nor can we fault the court's statement that a crime is committed in an especially 'depraved' manner when the perpetrator 'relishes the murder, *evidencing* debasement or perversion,' or '*shows* an indifference to the suffering of the victim and *evidences* a sense of pleasure' in the killing.

110 S.Ct. at 3058 (emphasis added). Petitioner argues that the limitation approved in *Walton* is "of precisely the same character as that provided by the Idaho Supreme Court's *Osborn* limiting construction." Pet. Br. at 15.

Petitioner is wrong. The critical distinction between the two constructions is that the construction approved in *Walton* requires *proof of circumstances capable of objective determination* which distinguish some murders from others. *Walton* specifically relied on this requirement in upholding the Arizona limiting construction. Some murders will involve facts showing that the defendant "*evidenc*[*ed*] debasement or perversion" or "*show*[*ed*] an indifference to the suffering of the victim and *evidenc*[*ed*] a sense of pleasure in the killing." Others will not. In the words of the Georgia Supreme Court, this requirement provides the "minimal objective guidelines" necessary in an aggravating factor. *Arnold v. State*, 224 S.E.2d at 391.

In sharp contrast to *Walton*, the phrases "cold-blooded," "callous" and "pitiless" do not provide these "minimal objective guidelines." As respondent concedes, these phrases do "not make findings of the aggravating factor[] depend on the presence of particular facts." Pet. Br. at 9. Moreover, as the Court of Appeals correctly held, these phrases fail to provide *any* substantive, objective guidance to the sentencer as to the circumstances under which the defendant has exhibited "utter disregard for human life" and those under which he has not. Is the sentencer's discretion meaningfully narrowed when it is allowed to sentence someone to die for being "cold-blooded"? By what objective criteria can a sentencer or a reviewing court distinguish a pitiless killing from one that is with pity? Indeed, it is difficult to imagine a first degree murder which is not "cold-blooded" or in which the defendant killed the victim *with* pity.

Petitioner seeks to buttress its position by relying on Florida's "cold-blooded" aggravating factor. Pet.Br. at 15-16. This reliance is fundamentally misplaced. In fact, an analysis of the Florida cases applying the "cold-blooded" aggravating factor show that Florida has repeatedly recognized that such an aggravating factor requires a limiting definition referring to facts capable of objective determination.

Florida statutes section 921.142(5)(i) provides that a death penalty may be imposed if the sentencer finds the murder was committed in a "cold, calculated and premeditated manner without pretense of moral or legal justification." In order to insure that this factor serves a proper narrowing function, however, the Florida Supreme Court has long made clear that it may *not* be applied absent proof of "heightened premeditation" showing that the defendant planned or arranged to commit murder before the crime began. *McKinney v. State*, 579 So.2d 80, 85 (Fla. 1991); *Rogers v. State*, 511 So.2d 526, 533 (Fla. 1987), *cert. denied*, 484 U.S. 1020 (1988). In

the absence of evidence showing that defendant planned the murders before the crime began, the Florida Supreme Court has routinely held that this factor cannot apply.[8] It will be upheld only when there is evidence of advance planning, such as a contract killing, showing that defendant planned the killings before the crime began.[9]

Contrary to petitioner's suggestion, the differences between Florida's "cold, calculated and premeditated" aggravating factor and Idaho's "utter disregard" aggravating factor are manifest. Florida has defined a "cold" killing by requiring proof of circumstances which are capable of objective determination. In contrast, and as petitioner concedes, Idaho has not required proof of any particular facts or circumstances to support this finding. Thus, the same term which Florida courts recognized *needed* a limiting definition actually *is* the limiting definition in Idaho. The Idaho analysis ends where the Florida analysis begins.

In the absence of a limiting construction like the one employed in Florida, the term "cold-blooded" could apply to every first degree murder. As Justice Huntley of the Idaho Supreme Court has recently noted in this exact context:

> What first degree murder fails to show 'callous disregard for human life?' I suppose this could be the 'pitiful' slayer who, prior to delivering the fatal blow,

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[8] *See, e.g., McKinney v. State*, 579 So.2d at 85; *Amoros v. State*, 531 So.2d 1256, 1261 (Fla. 1988); *Harmon v. State*, 527 So.2d 182, 188 (Fla. 1988); *Brown v. State*, 473 So.2d 1260, 1268 (Fla. 1985), *cert. denied*, 474 U.S. 1038 (1985); *Herzog v. State*, 439 So.2d 1372, 1380 (Fla. 1983); *Cannady v. State*, 427 So.2d 723, 730-731 (Fla. 1983); *Mann v. State*, 420 So.2d 578, 580-581 (Fla. 1982), *cert. denied*, 469 U.S. 1181 (1985).

[9] *See, e.g., Ponticelli v. State*, 593 So.2d 483 (Fla. 1991) (applying factor where the "evidence establishes that these were execution-styl murders that were carefully planned bfor th crime began."); *Kelley v. State*, 486 So.2d 578, 586 (Fla. 1986), *cert. denied*, 479 U.S. 871 (1986); *Routly v. State*, 440 So.2d 1257, 1265 (Fla. 1983), *cert. denied*, 468 U.S. 1220 (1984).

> tells the victim: 'Excuse me, pardon me, I know it's inconvenient, but I must now take your life.'
> . . .
>
> [The utter disregard factor is] nothing more than [a] kitchen sink aggravating circumstance which enable[s] the state to make *every* first degree murderer not just a candidate for, but an actual recipient of the harshest and most final of all criminal penalties. As a result, the mandate to narrow the class of death-eligible murders is abandoned.

State v. Charboneau, 774 P.2d 299, 342 (Idaho 1989) (Huntley, J., concurring and dissenting). The Court of Appeals correctly held the *Osborn* construction unconstitutional.[10]

To be sure, as this Court has recently observed, "the proper degree of definition of an aggravating factor of this nature is not susceptible of mathematical precision . . . ." *Walton v. Arizona*, 110 S.Ct. at 3058. Thus, aggravating factors need not be defined in terms which are solely, or even predominantly, capable of objective determination.

The fact remains, however, that in order for an aggravating factor to serve its constitutional purpose of "distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not," "minimizing the risk of wholly arbitrary and capricious action," and "mak[ing] rationally reviewable the process

[10] In disagreeing with this result below, Judge Trott observed that the *Osborn* construction points out certain facts which will *not* support a finding of utter disregard. *Creech v. Arave*, 947 F.2d at 889. While this observation is accurate, it does not solve the vagueness problem at issue. This Court has long made clear that in order to survive a vagueness challenge, a penal statute must define the conduct which *does* come within its reach. *See, e.g., Cline v. Frink Dairy Co.*, 274 U.S. 445, 459 (1927); *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). There is no authority for the remarkable proposition that a penal statute can survive a vagueness challenge by defining the conduct which does *not* come within its reach.

for imposing a sentence of death," it is essential that the factor contain a reference to, and require proof of, some circumstance capable of objective determination. Pursuant to this Court's capital jurisprudence, and as state supreme courts throughout the country have long recognized, absent some requirement of such a fact or circumstance, an aggravating factor cannot fulfill its constitutionally required goals.

B. Idaho Cases Establish That The Utter Disregard Aggravating Factor Provides No Guidance To The Sentencer.

Placing the language of the *Osborn* formulation aside, petitioner argues that "[t]he best evidence that Idaho's utter disregard factor is not so broad that it operates simply as a catch-all for murders not covered by other aggravating circumstances lies in the fact that the utter disregard circumstance has been applied in a narrow, consistent fashion." Pet.Br. at 24-25. Petitioner then analyzes those opinions in which the utter disregard factor has been applied and suggests that those opinions furnish constitutionally adequate guidance. Pet.Br. at 25-28.

Petitioner may be arguing that these cases show that the Idaho Supreme Court's finding of sufficient evidence to support the aggravating factor cured any error in sentencing. Alternatively, and recognizing that this case will be returned to the Idaho courts for resentencing pursuant to the Court of Appeals' decision on other issues upon which Mr. Creech prevailed, petitioner may be arguing that these cases *now* provide sufficient guidance to the sentencer. *See Sochor v. Florida*, —— U.S. ——, 112 S.Ct. 2114, 2121 (1992) (trial court is presumed to be aware of state supreme court applications of aggravating factors). Both arguments must be rejected.[11]

[11] Petitioner cannot be arguing that these cases could have somehow guided the sentencer in this case. At the time of both the

Petitioner analyzes the Idaho cases and posits six different circumstances under which the utter disregard factor exists: 1) a "planned murder for no good reason," 2) "the senseless and unprovoked murder of children," 3) a killing in which the defendant waited for his victim, 4) a killing where defendant shot at numerous people, 5) "wholly gratuitous killings of multiple victims," and 6) a calm murder after which the defendant refused to render medical aid to the victim. Pet.Br. at 25-26. Consistent with its concession that *Osborn* "does not make findings of the aggravating factor[] depend on the presence of particular facts," however, petitioner does not argue that the Idaho cases require any particular fact be established in order to sustain an utter disregard finding.

In fact, the Idaho Supreme Court has *never* suggested that any of the six circumstances proposed by petitioner must be present to establish utter disregard. The Idaho Supreme Court has found the utter disregard factor present where:

January 1982 and March 1983 sentencing hearings, no Idaho case had ever applied the utter disregard aggravating factor. While the trial court may be "presumed to know the law and to apply it in making [its] decision," *Walton v. Arizona*, 110 S.Ct. at 3057, it is untenable to presume that the trial court was aware of applications which occurred years *after* the actual sentencing. *See Smith v. Goguen*, 415 U.S. at 571, n.6 and 575 (in addressing a vagueness challenge to a state statute, courts must look at judicial interpretations of the statute at the time it is applied); *Lanzetta v. New Jersey*, 306 U.S. 451, 456 (1939) (same). *See also Walton v. Arizona*, 110 S.Ct. at 3067 (Scalia, J., concurring) (standards to guide sentencer's discretion must be "establish[ed] in advance.") Under these facts, Idaho Supreme Court opinions published *after* the sentencing hearing cannot rationally be held to have provided some type of guidance to the sentencer.

- The killing was "planned for no good reason" and where it was spontaneous.[12]
- The killing involved children and where it involved adults.[13]
- The defendant waited for his victim and where he did not have to wait.[14]
- The defendant shot at numerous people and where he simply shot at his victim.[15]
- The killing involved multiple victims and where it involved only one victim.[16]
- The killer was unprovoked and acted calmly in killing the victim or where he acted out of provocation in a fit of rage.[17]

The Idaho Supreme Court's "refus[al] to hold that any one of those factors *must* be present for a murder to satisfy this aggravating factor," *Cartwright v. Maynard*, 486 U.S. at 360, and petitioner's concession that the

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[12] *See, e.g., State v. Fetterly*, 710 P.2d 1202 (Idaho 1985) (murder planned 3 days in advance), *cert. denied*, 479 U.S. 870 (1986); *State v. Paz*, 798 P.2d 1 (Idaho 1990) (murder not planned in advance), *cert. denied*, —— U.S. ——, 111 S.Ct. 375 (1990).

[13] *See, e.g., State v. Aragon*, 690 P.2d 293 (Idaho 1984) (child victim); *State v. Fain*, 774 P.2d 252 (Idaho 1989) (same), *cert. denied*, 493 U.S. 917 (1989); *State v. Fetterly*, 710 P.2d 1202 (adult victim); *State v. Lankford*, 781 P.2d 197 (Idaho 1989) (same), *cert. denied*, —— U.S. ——, 110 S.Ct. 423 (1990).

[14] *See, e.g., State v. Fetterly*, 710 P.2d 1202 (waiting for victim); *State v. Paz*, 798 P.2d 1 (no waiting).

[15] *See, e.g., State v. Paz*, 798 P.2d 1 (numerous people); *State v. Osborn*, 663 P.2d 1111 (Idaho 1983) (shot victim alone).

[16] *See, e.g., State v. Pizzuto*, 810 P.2d 680 (Idaho 1991) (multiple victims), *cert. denied*, —— U.S. ——, 112 S.Ct. 1268 (1992); *State v. Fetterly*, 710 P.2d 1201 (single victim).

[17] *See, e.g., State v. Pizzuto*, 810 P.2d 680 ("unprovoked" killing which was "not out of rage"); *State v. Aragon*, 690 P.2d 293 (calm); *State v. Creech*, 670 P.2d 463 (provoked killing in a violent rage).

Osborn construction "does not make findings of the aggravating factor[] depend on the presence of particular facts," are fatal to petitioner's argument that the Idaho aggravating factor provides the type of guidance required by the Eighth Amendment.

Indeed, as petitioner's analysis of the Idaho cases confirms, rather than require that any particular fact be present in order to establish utter disregard, and rather than applying the utter disregard factor by identifying and relying upon a limiting principle, the Idaho Supreme Court appears to rely on the circumstances of each case to sustain the finding.[18] This is precisely what *Maynard v. Cartwright* and *Clemons v. Mississippi* forbid. In fact, the Idaho Supreme Court has *never* reversed an utter disregard finding.[19] *See Clemons v. Mississippi*, 110 S.Ct. at 1455 (Blackmun, J., concurring.)

Nevertheless, petitioner argues that the Idaho Supreme Court's applications of the utter disregard factor show that it has been used in a "narrow, consistent fashion." Pet.Br. at 24-25. Petitioner's current proposal is that utter disregard factor has been limited to situations in which "the defendant acted with no significant provoca-

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[18] *See, e.g., State v. Lankford*, 747 P.2d 710, 725 (Idaho 1987), *vacated on other grounds, Lankford v. Idaho*, —— U.S. ——, 111 S.Ct. 1723 (1991); *State v. Beam*, 710 P.2d 526, 534 (Idaho 1985); *State v. Paradis*, 676 P.2d 31, 40 (Idaho 1984), *cert. denied*, 468 U.S. 1220 (1984); *State v. Gibson*, 675 P.2d 33, 42 (Idaho 1983), *cert. denied*, 468 U.S. 1220 (1984).

[19] Petitioner suggests that *State v. Charboneau*, 774 P.2d 299 (Idaho 1989) was such a case. Pet. Br. at 27. Petitioner is wrong. The *Charboneau* court remanded the case because there was insufficient evidence to support a *nonstatutory* aggravating factor upon which the trial court had relied. 774 P.2d at 321-324. In light of this remand, the court explicitly noted that "it is unnecessary for us to consider at this time whether the evidence supports a finding of either statutory aggravating circumstance under I.C. section 19-2515(g)(5) and (6)." 774 P.2d at 324.

tion, without emotion or killed for mere convenience such as to destroy a witness to a crime." Pet.Br. at 25.[20] Contrary to petitioner's suggestion, however, the Idaho Supreme Court has never articulated a construction of the utter disregard factor which limited it to these situations.[21]

In any event, petitioner's most recent thesis is wrong. The fact that "defendant acted with no significant provocation, without emotion or killed for mere convenience such as to destroy a witness to a crime" is neither necessary nor sufficient to justify a finding of utter disregard. *Compare State v. Searcy*, 798 P.2d 914, 921 (Idaho 1990) (trial court does not find utter disregard where defendant kills a witness to a robbery without provocation or emotion) *with State v. Creech*, 670 P.2d 463 (trial court does find utter disregard where killing was provoked by a deadly attack, where killing was with great emotion, and where the victim was not a witness to any crime).

Indeed, an analysis of those cases which focus upon the presence of provocation not only undermines petitioner's claim of consistent application, but goes further and il-

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[20] Petitioner's definition of the factor has changed dramatically over the years. On direct appeal to the state supreme court, petitioner argued that the utter disregard factor applied to defendants who did "not possess the normal restraints against committing murder, but nonetheless do[] not do so sadistically or with torture," to the person "who is not affected by the moral precept that it is wrong to commit murder," and to murders "which are particularly inexcusable." Respondent's Brief on Direct Appeal at 34-35.

In this Court, petitioner has totally changed its definition, explaining that utter disregard is a killing where the defendant acted with "no significant provocation, without emotion or killed for mere convenience such as to destroy a witness to a crime." Pet. Br. at 25.

[21] Petitioner's focus on "significant provocation" is in itself troubling. Under Idaho law, a homicide committed under significant provocation is not first degree murder, but manslaughter. Idaho Code Section 18-4006. Thus, petitioner's suggested limitation on the utter disregard factor is illusory: it would only apply where defendant could not be convicted of first degree murder and sentenced to death to begin with.

lustrates the extraordinary breadth of the *Osborn* construction. In *State v. Aragon*, 690 P.2d 293, the court upheld an utter disregard finding because it was:

> supported by evidence that appellant acted calmly, yet violently, and refused to render aid to the victim, even though given several opportunities, and even though it was obvious the victim was in mortal peril. His only concern was to cover up his own participation in the incident.

690 P.2d at 302. *See also State v. Pizzuto*, 810 P.2d at 712 (in upholding utter disregard finding, court notes that the killing was "not out of rage" and was "unprovoked").

These cases show that petitioner's latest interpretation of the *Osborn* construction is illusory. It is present when a defendant kills "calmly" and "not out of rage" and when he kills in an "excessive violent rage." It is present when a defendant's actions are completely unprovoked and when the defendant kills in response to an unprovoked attack. It is present when a defendant refuses to refer medical aid to the victim and when he does refer medical aid to the victim. It is present when a defendant tries to cover-up his own participation in the murder and when he immediately confesses to the crime.

In the final analysis, however, it is unnecessary to compare different cases to prove that the *Osborn* limitation is without meaning. At least one trial court has recently applied *Osborn* to the same facts twice, with precisely the same record, and come up with two completely different results: once finding the utter disregard factor and once not. *Compare State v. Leavitt*, 775 P.2d 599, 608 (Idaho 1989) (finding utter disregard), *cert. denied*, 493 U.S. 923 (1989) *with State v. Leavitt*, 822 P.2d 523, 524 (Idaho 1991) (not finding utter disregard). It is difficult to imagine a clearer example of how little guidance the *Osborn* formulation really provides.

C. Under Any Interpretation, There is Insufficient Evidence To Support The Utter Disregard Aggravating Factor In This Case.

Even assuming *arguendo* that petitioner is correct in contending that the utter disregard factor is only applied when the defendant has acted "with no significant provocation, without emotion or killed for mere convenience such as to destroy a witness to a crime," and that the state courts in this case were somehow aware of this limitation, there is insufficient evidence to support reliance on this factor.

As this Court has recently made clear, where state courts have supplied a proper limiting construction to a facially invalid aggravating circumstance, and have applied it to the facts presented, reliance on the aggravating circumstance is still improper when the facts are insufficient to prove, beyond a reasonable doubt, that the limiting construction has been met. *Lewis v. Jeffers*, 110 S.Ct. at 3103-3104. *See Jackson v. Virginia*, 443 U.S. 307 (1979). As the Court of Appeals correctly held, this is precisely the situation in this case.

The trial court found that "the defendant did not instigate the fight with the victim, but the victim, without provocation, attacked [defendant]." (JA 52.) In fact, the uncontradicted record shows that the victim attacked Mr. Creech with a sock full of batteries and, moments later, with a razor blade attached to a toothbrush. (RT 1984 at 15-20, 26-27, 29-32.) During this unprovoked assault, the victim cut Mr. Creech's arms, face and stomach. (RT 1984 at 31-32.) The trial court itself concluded that Mr. Creech was justified in defending himself but found that Mr. Creech's actions went beyond legitimate self-defense, reflecting the fact that Mr. Creech was in an "excessive violent rage." (JA 52.) Moreover, immediately after the fight, Mr. Creech referred medical aid to the victim. (ER 156; RT 1984 at 34.)

In arguing that a reasonable sentencer would nevertheless find that Mr. Creech acted with *no* significant provocation, petitioner argues that the trial court's findings of mitigation were "generous." Pet.Br. at 31. Petitioner ignores the fact that the Idaho Supreme Court reviewed the record and held "that the evidence at the sentencing hearing clearly supports the trial court's findings of . . . mitigating circumstances." *State v. Creech*, 670 P.2d at 470.

Petitioner also argues that "Creech engineered an attack on [sic] Dale Jensen in order to create a pretext for killing him" and that the trial court "viewed the attack by Jensen as something that served Creech as a mere pretext for the killing." Pet.Br. at 30 and 31, n.6. The state courts have repeatedly rejected this very argument. Indeed, the Idaho Supreme Court explicitly noted that the trial court "did not decide or find that the murder had been performed on contract or by plan." *State v. Creech*, 670 P.2d at 465. In fact, the trial court not only found that Jensen's attack was "unprovoked," but it went further and found that the unprovoked attack actually constituted a *mitigating* factor. (JA 52.)

Finally, petitioner argues that Mr. Creech's prior homicide convictions establish that in responding to Jensen's unprovoked attack in this case, Mr. Creech acted "with no significant provocation, without emotion or killed for mere convenience such as to destroy a witness to a crime." Pet.Br. at 30. This argument must be rejected: Mr. Creech's prior record was introduced to prove and was relevant to the section 19-2515(g)(8) "propensity" aggravating factor.[22] Because the "propensity" aggravating factor focuses on the defendant's background and potential for future dangerousness, it has nothing whatever to do with whether the "acts or circumstances surrounding the crime" reflect an utter disregard for human life.

[22] Section 19-2515(g)(8) provides that it is an aggravating factor if the defendant "has exhibited a propensity to commit murder which will probably constitute a continuing threat to society."

On this record, there is simply insufficient evidence upon which a rational factfinder could find beyond a reasonable doubt either "acts or circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer," *State v. Osborn*, 631 P.2d at 200-201, or that Mr. Creech killed Jensen "with no significant provocation, without emotion." Pet.Br. at 25. This was not a "cold-blooded, pitiless" killing done without provocation or emotion, it was a killing done in an "excessive, violent rage" arising out of an unprovoked, deadly assault *by the victim himself*. While the trial court found that Mr. Creech went beyond what hindsight proved to be legitimate self-defense, the fact remains that it was the victim's unprovoked and deadly assault which initiated the fight. Mr. Creech's actions in this case were not those of a calm, calculating killer; they were those of a man subject to an unprovoked and deadly attack. Because the record of this case will not support a finding that Mr. Creech was acting "with no significant provocation [or] without emotion," the utter disregard aggravating factor was inapplicable to this case.

D. Because The Idaho Supreme Court Did Not Engage In Harmless Error Analysis Or Appellate Reweighing, A Remand Is Required.

Finally, petitioner argues that the Idaho Supreme Court's review of this case cured any "deficiency in the way sentence was imposed in the trial court." Pet.Br. at 17-24. This argument must be rejected because it ignores the nature of the Idaho capital punishment scheme as well as the scope of the appellate review performed in this case.

When a state uses aggravating circumstances solely to distill death-eligible murders from all first degree mur-

ders, and does not require the sentencer to balance aggravating factors against mitigating factors, reliance on an unconstitutional aggravating factor does not require a remand where at least one valid aggravating circumstance remains. *Zant v. Stephens*, 462 U.S. at 873-874. Where the state scheme also uses aggravating circumstances to guide the sentencer's discretion in deciding what penalty to impose, as where the sentencer is required to weigh any mitigating factors against the aggravating factors, reliance on an unconstitutional aggravating circumstance requires a remand. *Cartwright v. Maynard*, 822 F.2d at 1480, 1482-1483.

To be sure, in such "weighing states" a state appellate court may avoid the need for a remand, and uphold a death sentence which was based on an unconstitutional aggravating factor, in either of two ways. First, it may disregard the invalid aggravating factor and engage in "careful appellate weighing of aggravating against mitigating circumstances." *Clemons v. Mississippi*, 110 S.Ct. at 1446-1449. *Accord Stringer v. Black*, —— U.S. ——, 112 S.Ct. 1130, 1137 (1992). Alternatively, it may disregard the invalid aggravating factor and apply harmless error analysis. *Sochor v. Florida*, 112 S.Ct. at 2122-2123; *Stringer v. Black*, 112 S.Ct. at 1137; *Clemons v. Mississippi*, 110 S.Ct. at 1450-1451.

These alternatives arise out of the "well-established Eighth Amendment requirement of individualized sentencing determinations in death penalty cases." *Stringer v. Black*, 112 S.Ct. at 1136. In light of this fundamental Eighth Amendment requirement, an appellate court in a weighing state may *not* affirm a death sentence by relying on an unconstitutional aggravating factor:

> In a weighing State . . . there is Eighth Amendment error when the sentencer weighs an 'invalid' aggravating circumstance in reaching the ultimate decision to impose a death sentence. Employing an invalid aggravating factor in the weighing process 'creates the possibility . . . of randomness,' by placing a 'thumb [on] death's side of the scale,' thus 'creat[ing] the risk [of] treat[ing] the defendant as more deserving of the death penalty.' Even when other aggravating factors exist as well, merely affirming a sentence reached by weighing an invalid aggravating factor deprives a defendant of 'the individual treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances.'

Sochor v. Florida, 112 S.Ct. at 2119 (citations omitted). The procedure forbidden in *Sochor* is exactly what happened in this case.

Here, Idaho Code Section 19-2515(c) provides that where a trial court has found that a statutory aggravating factor exists, "the court shall sentence the defendant to death unless the court finds that mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstance found . . . ." *See also* Idaho Code Section 19-2515(e) (requiring a written statement of reasons where "the court finds that mitigating circumstances outweigh the gravity of any aggravating circumstances found . . . .") Thus, like Oklahoma, Florida and Mississippi, Idaho is a "weighing state." [23]

Because the Idaho Supreme Court believed *Osborn* was a proper limiting construction, it did not disregard the utter disregard factor and engage in either appellate re-

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[23] Without discussion, petitioner asserts that "Idaho is not a weighing state as that term is defined in *Clemons v. Mississippi*, 494 U.S. 738 (1990)." Pet. Br. at 23. In light of Idaho Code Section 19-2515(c) and (e)—both requiring the trial court to weigh aggravating factors against mitigating factors—petitioner's assertion is plainly incorrect. *See Stringer v. Black*, 112 S.Ct. at 1136 (noting that Mississippi is a "weighing state" because the sentencer weighs aggravating circumstances against mitigating circumstances); *Parker v. Dugger*, —— U.S. ——, 111 S.Ct. 731, 738 (1991) (same conclusion with respect to Florida); *Clemons v. Mississippi*, 110 S.Ct. at 1446.

weighing or harmless error analysis. Thus, nothing in the review process cured the error. *Sochor v. Florida*, 112 S.Ct. at 2119; *Stringer v. Black*, 112 S.Ct. at 1137.

Contrary to petitioner's suggestion, the fact that the Idaho Supreme Court found that the evidence supported the trial court's utter disregard finding does not cure the error. Pet.Br. at 17-20. When a sentencer finds an aggravating factor to be present, and the state appellate court finds sufficient evidence to support this finding without ever applying a proper limiting construction of the factor, the sentencer's error has not been cured on appeal. *Stringer v. Black*, 112 S.Ct. at 1134-1137; *Maynard v. Cartwright*, 486 U.S. at 364; *Godfrey v. Georgia*, 446 U.S. at 429-433. If the *Osborn* construction applied by the actual sentencer is constitutionally insufficient, the Idaho Supreme Court's application of that same construction cannot cure the sentencer's error.

Alternatively, petitioner argues that the Idaho Supreme Court's proportionality review, in which it found the death sentence imposed on Mr. Creech to be proportionate with other cases, constitutes an analysis which renders any "deficiency in the way sentence was imposed in the trial court" of no import. Pet.Br. at 21-24. Not so. Where the sentencer in a weighing state has relied on a vague aggravating factor in imposing a death sentence, this Court has repeatedly vacated the death sentence notwithstanding the state supreme court's proportionality analysis. *See, e.g., Stringer v. Black*, 112 S.Ct. at 1134; *Clemons v. Mississippi*, 110 S.Ct. at 1446; *Godfrey v. Georgia*, 446 U.S. at 427. Indeed, as the Court has recently made clear, even when a state's proportionality review suggests it may have evaluated defendant's sentence in the absence of an invalid aggravating factor, it is no substitute for harmless error analysis. *Sochor v. Florida*, 112 S.Ct. at 2123 and 2123-2124 (O'Connor, J., concurring). This principle applies with even greater force here, where it is clear that in performing its proportionality review, the

Idaho Supreme Court *included* the unconstitutional utter disregard factor in its calculus.

On this record, petitioner's argument that the Idaho Supreme Court's review of this case cured the "deficiency in the way sentence was imposed in the trial court" must be rejected. While there are several techniques by which a state appellate court may uphold a death sentence when a sentencer has relied on an invalid aggravating factor, none were employed in this case. The Court of Appeals correctly held that a remand was the appropriate remedy for the sentencer's consideration of an unconstitutional aggravating factor in the weighing process that lead to death.

CONCLUSION

The Court of Appeals' decision should be affirmed.

Respectfully submitted,

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